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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 128

PERRY S. OLSON AND BEN S. OLSON, PARTNERS, DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF OLSON BROS. OR OLSON & OLSON, PLAINTIFFS IN ERROR,

vs.

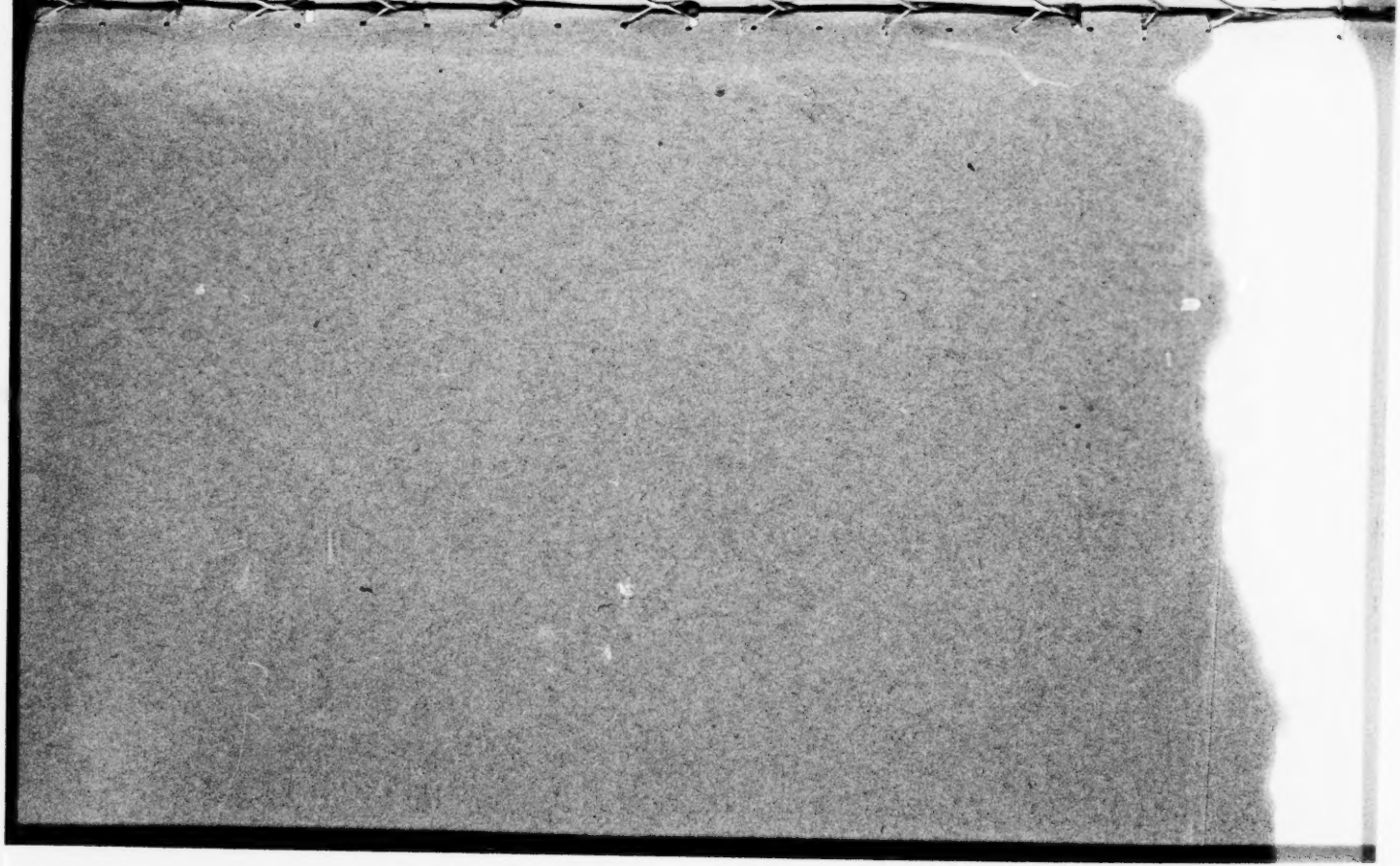
UNITED STATES SPRUCE PRODUCTION CORPORATION

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON

FILED JULY 25, 1924

Motion to file a... ... complaint.....
Amended complaint.....

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 2, 1924



(29,768)

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DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON

CITATION—In usual form, showing service on Carey & Kerr and Omar C. Spencer; filed June 14, 1923; omitted in printing

[fol. 3] [File endorsement omitted]

[fol. 4] UNITED STATES SUPREME COURT

PERRY S. OLSON and BEN S. OLSON, Partners, Doing Business under the Firm Name and Style of Olson Bros. or Olson & Olson, Plaintiffs,

vs.

UNITED STATES SPRUCE PRODUCTION CORPORATION, a Corporation, Defendant

WRIT OF ERROR—Filed June 14, 1923

THE UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Judges of the District Court of the United States for the District of Oregon, Greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the District Court before the Honorable Charles E. Wolverton, one of you, between Perry S. Olson and Hon. S. Olson, partners doing business under the firm name and style of Olson Bros. or Olson & Olson, plaintiffs, and plaintiffs in error, and United States Spruce Production Corporation, a corporation, defendant, and defendant in error, a manifest error hath happened to the great damage of the said plaintiffs in error, as by complaint doth appear; and we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you will have the same at Washington, District of Columbia, within sixty days from the date hereof, in the said [fol. 5] Supreme Court of the United States to be there and then inspected, the said Supreme Court may cause further to be done therein

to correct that error, what of right and according to the laws and customs of the United States of America, should be done.

Witness the Honorable William H. Taft, Chief Justice of the United States this 14th day of June, 1923.

G. H. Marsh, Clerk of the United States District Court for the District of Oregon. (Seal of the United States District Court of Oregon.)

The foregoing Writ of Error was duly served upon the District Court of the United States for the District of Oregon, on June 14, 1923, by lodging with me as the Clerk of said Court on said date a true copy of said writ.

G. H. Marsh, Clerk United States District Court, District of Oregon.

[fol. 6] [File endorsement omitted.]

[fol. 7] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON, MARCH TERM, 1922

Be it remembered, That on the 10th day of May, 1922, there was duly filed in the District Court of the United States for the District of Oregon, a Transcript of record removed from the Circuit Court of the State of Oregon for Multnomah County, and that the Complaint and Order of Removal contained in said transcript are in words and figures as follows, to wit:

[fol. 8] IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR THE COUNTY OF MULTNOMAH

PERRY S. OLSON and BEN S. OLSON, Partners, Doing Business Under the Firm Name and Style of Olson Bros. or Olson & Olson, Plaintiffs,

vs.

UNITED STATES SPRUCE PRODUCTION CORPORATION, a Corporation, Defendant

COMPLAINT—Filed Apr. 1, 1922

Now comes the plaintiffs, and for cause of action against the Defendant, allege:

I

That the Plaintiffs, during all the times and dates herein mentioned were partners, doing business under the firm name and style of Olson Bros., and/or Olson & Olson.

II

That the Defendant is a Corporation, organized and existing under the laws of the State of Washington, and organized by the Director of Aircraft Production, under and pursuant to the Act of Congress of July 9, 1918, U. S. Compiled Statutes, 1918, Compact Edition Appendix, Page 1771, for the purchase, production, manufacture and sale of aircraft, aircraft equipment or materials therefor, and also duly authorized to transact business in the State of Oregon, a copy of which said articles of incorporation and a supplement article are hereto attached, marked Exhibit A, hereby referred to and made a part hereof, by reference thereto.

III

That in accordance with said Act of Congress, all the capital stock of said Defendant, Corporation, except the qualifying shares, was and is owned by the Government of the United States of America, and the Defendant, and the Trustees representing it, were elected by [fol. 9] and for the said Government, and neither the Corporation nor the stockholders other than the said Government have any interest in the said Corporation, or its property, except as agents of the said Government, and under and pursuant to the authority contained in the Acts of Congress. That said Corporation was organized, among other things, for the purpose of facilitating and expediting production of aircraft, aircraft equipment and/or materials therefor, for the United States and Governments allied with it in the prosecution of the war.

IV

That under and pursuant to the Laws of the United States, and particularly to the Act of Congress of June 3, 1916, (Chapter 134, Section 120-39, Stat. 166) and the Act of Congress of March 4, 1917, (c. 180, 39, Stat. 1193) it is provided that

"The President, in time of war or when war is imminent, is empowered, through the head of any department of the Government, in addition to the present authorized methods of purchase or procurement, to place an order with any individual, firm, association, company, corporation, or organized manufacturing industry for such product or material as may be required, and which is of the nature and kind usually produced or capable of being produced by such individual, firm, company, association, corporation, or organized manufacturing industry.

Compliance with all such orders for products or material shall be obligatory on any individual, firm, association, company, corporation, or organized manufacturing industry or the responsible head or heads thereof and shall take precedence over all other orders and contracts theretofore placed with such individual, firm, company, association, corporation, or organized manufacturing industry, and any individual, firm, association, company, corporation, or organized

manufacturing industry, or the responsible head or heads thereof owning or operating any plant equipped for the manufacture of arms or ammunition, or parts of ammunition, or any necessary supplies or equipment for the Army, and any individual, firm, association, company, corporation or organized manufacturing industry or the responsible head or heads thereof owning or operating any manufacturing plant, which, in the opinion of the Secretary of War shall be capable of being readily transformed into a plant for the manufacture of arms or ammunition, or parts thereof, or other necessary supplies or equipment, who shall refuse to give to the United States such preference in the matter of the execution of orders, or who shall refuse to manufacture the kind, quantity, or quality of arms or ammunition, or the parts thereof, or any necessary supplies or equipment, as ordered by the Secretary of War or who shall refuse to [fol. 10] furnish such arms, ammunitions or parts of ammunition, or other supplies or equipment, at a reasonable price as determined by the Secretary of War then, and in either such case, the President, through the head of any department of the Government, in addition to the present authorized methods of purchase or procurement herein provided for, is hereby authorized to take immediate possession of any such plant or plants, and through the Ordnance Department of the United States Army, to manufacture therein in time of war, or when war shall be imminent, such product or material as may be required, and any individual, firm, company, association, or corporation, or organized manufacturing industry, or the responsible head or heads thereof, failing to comply with the provisions of this section shall be deemed guilty of a felony, and upon conviction shall be punished by imprisonment for not more than three years and by a fine not exceeding $50,000.

The compensation to be paid to any individual, firm, company, association, corporation, or organized manufacturing industry for its products or material, or as rental for use of any manufacturing plant while used by the United States, shall be fair and just."

V

That under and pursuant to the Acts of Congress, and particularly to the Acts of Congress approved April 11, 1918, and as amended by the Act of Congress of July 9, 1918, the Secretary of War was authorized to acquire war material, which under the Act of Congress of July 1, 1918 (Compact Edition Section 3115, 1/16) includes "Arms, armaments, ammunition, store supplies and equipment for ships, and airplanes, and everything required for or in connection with the production thereof" including standing or fallen timber, saw mills, camps, machinery, logging roads, logging railroads, and equipment, materials and supplies and any works, property or appliances suitable for the effectual production of such lumber and timber products for the Army of the United States.

VI

That acting under, and pursuant to said Acts of Congress and the authority conferred upon the War Department of the United States

Government, a Department known as the Spruce Production Division, with offices and headquarters at Portland, Oregon, and which [fol. 11] Department under and pursuant to the provisions of said Acts of Congress and the authority given to the War Department was incorporated, and thereafter known as the United States Spruce Production Corporation, and that during all the times herein mentioned, Colonel Brice P. Disque, later Brigadier General Brice P. Disque, was in charge and command of said Spruce Production Division and later of said Spruce Production Corporation.

VII

That during all the times herein mentioned, said Olson Bros., Plaintiffs, were conducting a logging camp and logging operations near Seaside, Oregon, and on March 1, 1918, were carrying on logging operations upon that certain real property, described as Section Eleven (11) Township Six (6) Range Ten (10) West Willamette Meridian, and Section Two (2), Township Six (6) Range Ten (10) West Willamette Meridian, in Clatsop County, Oregon. That there was on March 1, 1918, located upon said Section 11, approximately 12,000,000 feet of merchantable Spruce and Hemlock timber, 75 to 80 per cent of which was Hemlock and that there was approximately 8,000,000 feet of merchantable Spruce and Hemlock timber located upon said Section 2, 75 to 80 per cent of which was Hemlock. That on and prior to March 1, 1918, the said Plaintiffs, Olson Bros., had entered into a contract with the Prouty Lumber & Box Company, to cut and deliver to the said Prouty Lumber & Box Company, all merchantable Spruce and Hemlock timber, located on said Sections 11 and 2, as aforesaid. That the Plaintiffs, on and prior to March 1, 1918, for the purpose of removing said timber, had furnished material for and constructed railroad tracks for a distance of appoximately one and one-half miles, had placed the donkey engines, rollways and equipment, approximately on to the center of said Section 11 and had cut, sawed, bucked into logs, ready for transportation over said railroad, approximately 5,000,000 feet of Hemlock and Spruce logs, and had upon the ground all necessary equipment for removing same, in compliance with their said contract, and had worked about one or two days hauling logs to rollway, and had expended upon construction of said railroad, and placing said equipment upon said Section 11, the sum of $18,000.00 [fol. 12] and had expended the sum of approximately $6,750.00 in cutting and bucking said 5,000,000 feet of timber into logs.

VIII

That on or about March 1, 1918, Brigadier General Brice P. Disque, or Colonel Brice P. Disque, as his title may have been at that time, acting under the authority of the War Department and/or said Acts of Congress, and/or under the directions of the Director of Aircraft Production, organized under and pursuant to the said Acts of Congress, then being in charge and/or command of the Spruce Production Division with offices and headquarters at Port-

land, Oregon, sent, or caused to be sent to the logging camp of the Plaintiffs, certain soldiers and an officer of the Army of the United States, under his command, to-wit, Lieutenant J. C. Smith, which officer notified the Plaintiffs that they could no longer cut and remove Hemlock timber, under and pursuant to their contract with the Prouty Lumber & Box Company, and that unless they confined their operations exclusively to the cutting of airplane Spruce that it would be commandeered and taken over by the Government, and at the same time informed Plaintiffs that the Plaintiffs, in going ahead and geting out airplane Spruce exclusively, would be reimbursed by the Government.

IX

That the Plaintiffs, acting upon said directions and promise of compensation for any losses that might be suffered by them thereupon abandoned their attempt to remove all of the merchantable timber from said two sections of land, and thereafter devoted their entire time and energy, and the use of their money and equipment and employment of all their employees to getting out airplane Spruce [fol. 13] logs exclusively from March 1, 1918, to November 12, 1918. That the Plaintiffs, between said dates, carried out and performed all the directions and instructions given to them by said Lieutenant Smith and other Lieutenants sent to their camp under the direction of said General Brice P. Disque, acting for and on behalf of the Spruce Production Division and/or said Defendant. That the Plaintiffs were directed by said officers to, and did leave upon the ground upon said Section 11, all the merchantable Hemlock timber, cut and bucked by them, as aforesaid, and all the standing merchantable Hemlock timber, and considerable merchantable Spruce not considered fit for airplane stock, and took up and removed approximately 1,200 feet of said railroad tracks so constructed by them, as aforesaid, and constructed and placed rails upon some 3,000 feet of new railroad, including two trestles, leading on to said Section 2, and removed its donkey engines and equipment from Section 11 on to said Section 2, at an additional cost to Plaintiffs of approximately $6,500.00 for all of which the Plaintiffs paid, and at the request and under the direction and instructions of said officers and with the understanding and agreement that they would be compensated for any loss that they might suffer by reason thereof. That the plaintiffs, in tearing up and removing said railroad from said Section 11, and from leaving upon the ground all merchantable Hemlock timber, cut and bucked into logs, on said Section 11, as aforesaid, and in being thereby prevented and/or being unable to remove said merchantable Hemlock timber from said Section while said railroad was constructed thereon and could be used to transport same, thereby lost all of the cost of constructing said railroad on to said Section 11, amounting to the sum of approximately $18,000.00 and the cost of cutting and bucking said timber into logs, as aforesaid, amounting to the sum of approximately $6,750.00 and all the [fol. 14] profit which Plaintiffs would reasonably have made upon said 12,000,000 feet of said merchantable timber if they could have

continued removing same therefrom, amounting to the reasonable value of the sum of $4.00 per 1,000 feet, or the sum of $48,000.00 was lost to Plaintiffs by reason thereof.

X

That Plaintiffs were instructed and requested by said officers to get out and remove only No. 1 and No. 2 Spruce, which required the carrying on of what is known as selective logging, and which required the leaving upon the ground of a large amount of merchantable Spruce timber, and all merchantable Hemlock timber. That from March 1, 1918 to November 12, 1918, while Plaintiffs were carrying on logging operation, under the direction of said officers, as aforesaid, they were able to get out only approximately 2,500,000 feet of spruce, for which they received pay in the sum of $7.50 per 1,000 feet, or the sum of approximately $18,750.00. That the cost to Plaintiffs in labor and in operating said logging camp during said time, not including the cost of removing said railroad and equipment was at least the sum of $5,000.00 per month, and the Plaintiffs thereby lost and were damaged in the further sum of $21,250.00.

XI

That the plaintiffs were requested, required and/or directed by said officers to furnish approximately 6,000 feet of lumber of the reasonable value of $30.00 per 1,000 feet, and to haul same to said camp at an additional cost of $10.00 per 1,000 feet for the purpose of constructing bunkers for said soldiers employed in said camp, which bunkers were required to have an air space of 500 cubic feet per soldier as required and directed by said officers and plaintiffs were required to and did pay for the construction thereof, [fol. 15] approximately the sum of $120.00, and furnished hardware therefor, of the value of $15.00 making a total expense to Plaintiffs by reason thereof, the sum of $375.00, and that the Plaintiffs were also ordered, directed and/or requested to construct shower bath apartments, at the cost to plaintiffs of $50.00 which the Plaintiffs did construct, as requested. That said Plaintiffs were requested and directed to assemble upon the ground in said camp, material for construction of a Recreation Hall, for use of said soldiers employed in said camp, and at the time of the Armistice, had assembled material therefor, of the reasonable value of $200.00 all at the cost and expense of the Plaintiffs, and which was a total loss to the Plaintiffs.

XII

That the Plaintiffs, acting under and carrying out the orders and instructions of said officers, were required and requested to cut said Spruce timber into logs in lengths of 20, 22, 24 and 26 feet, and approximately 80 per cent in lengths of 20 to 24 feet. That in carrying on their logging operations prior to March 1, 1918, Plaintiffs were cutting logs 32 to 44 feet, the average being

approximately 32 feet. That the additional cost of logging said Spruce timber in short lengths as directed and requested by said officers, was approximately 33 1/3 per cent more to the plaintiffs.

XIII

That on March 1, 1918, when said officers came to Plaintiffs' camp, as aforesaid, the Plaintiffs were the owners of logging equipment of the approximate value of $32,000.00 and that on November 12, 1918, when Plaintiffs were notified to cease operations by said officers of the Spruce Production Corporation, Plaintiffs were indebted to the Prouty Lumber & Box Company, for moneys advanced to them to carry on said logging operations, in the sum of $32,000.00 and the Plaintiffs, in order to settle said indebtedness, turnd over to the said Prouty Lumber & Box Company, all of the said equipment of the approximate value of $32,000.00 and [fol. 16] thereby lost all the equipment and property held by them at time said operations were commenced on March 1, 1918.

XIV

That by reason of said operations under the directions and/or by the request of said officers, the Plaintiffs lost all the profit which they would have made by removing all the merchantable timber on said lands not removed therefrom, and by reason of all the acts aforesaid, the Plaintiffs have been reasonably damaged in the sum of $60,000.00, for which it was promised and agreed by said officers that the Plaintiffs would be compensated for by the Government, acting by and/or through said Defendant, and/or said Spruce Production Division.

XV

That on or about the 19th day of August 1918 said United States Spruce Production Corporation was organized as a Corporation under the Laws of Washington, as aforesaid, and under and pursuant to the said Act of Congress of July 9, 1918, and thereafter took over and assumed control of and undertook the work theretofore carried on and/or directed by said Spruce Production Division to carry out and perform all the agreements and promises and/or contract theretofore made by said officers, aforesaid, acting under said Spruce Production Division made to Plaintiffs, and acting by and through the same officers, thereupon continued to carry on and/or direct said work, further promised and assured Plaintiffs that they would be compensated therefor, and continued to carry on said logging operations in the same manner as had been done prior thereto and thereby ratified and confirmed all that had been theretofore done and/or promised by said Spruce Production Di- [fol. 17] vision to and with the Plaintiffs, and that on or about November 15, 1918, after the Armistice and after Plaintiffs had been notified that they should cease work at said camp, and after

said Defendant had ceased to operate and/or direct the operations at said camp, the said Defendant United States Spruce Production Corporation, acting by Brigadier General Disque, notified Plaintiffs to send in their claim for damages.

XVI

That on March 2, 1919, Congress passed an Act, known as the "Dent Act" which among other things provided "That the Secretary of War be, and he is hereby authorized to adjust, pay or discharge any agreement, express or implied, upon a fair and equitable basis that has been entered into, in good faith during the present emergency and prior to November twelfth, nineteen hundred and eighteen by any officer, or agent acting under his authority, direction, or instruction, or that of the President, with any person, firm, or corporation for the acquisition of lands, or the use thereof, or for damages resulting from notice by the Government of its intention to acquire or use said lands, or for the production, manufacture, sale, acquisition or control of equipment, materials or supplies, or for services, or for facilities, or other purposes connected with the prosecution of the war, when such agreement has been performed in whole or in part, or expenditures have been made or obligations incurred upon the faith of the same by any such person, firm, or corporation prior to November twelfth, nineteen hundred and eighteen, and such agreement has not been executed in the manner prescribed by law: Provided that in no case shall any award either by the Secretary of War, or the Court of Claims include prospective or possible profits on any part of the contract [fol. 18] beyond the goods and supplies delivered to and accepted by the United States, and a reasonable remuneration for expenditures and obligations or liabilities necessarily incurred in performing or preparing to perform said contract or order: Provided further, that this Act shall not authorize payment to be made of any claim not presented before June thirtieth, nineteen hundred and nineteen."

XVII

That thereafter, and within the time provided in said Dent Act, to-wit, on or about the 20 day of June 1919, Plaintiffs pursuant to the terms of said Act, presented their claim for damages to the Secretary of War of the United States of America and/or to the Claim Board of the Spruce Production Corporation, at Portland, Oregon, which Board was authorized by the War Department to hear and pass upon such claims, and that thereafter plaintiffs were permitted to file an amended claim for damages, increasing the amount of damages claimed by them and that thereafter final hearing was had upon said claim by said Claim Board, and on or about January 21, 1922, said Claim Board, acting by Jacob E. Fickel, Major of Air Service, and Max Church, Recorder, made and filed findings in which the claims of the Plaintiffs were disallowed in full and which find-

ings were approved by Chas. Van Way, Lieutenant Colonel, Cavalry, as President of said Board.

XVIII

That the Secretary of War has heretofore ruled that it is and has been the uniform policy of the Settlement Agents of the War Departments to refer any case involving operations of the United States Spruce Production Corporation to the Claim Board of that Corpo-
[fol. 19] ration, and that the decision of said Board is final and will not be reviewed by the War Department, and that the only recourse of of the Claimants being to the proper State or Federal Courts. Therefore the Plaintiffs bring this action in this Court.

Wherefore, the plaintiffs demand judgment against the Defendant for the sum of $60,000.00 damages suffered by the Plaintiffs by reason of the acts herein alleged, together with the costs and disbursements herein.

John C. Murphy, O. A. Neal, Attorneys for Plaintiffs.

[fol. 20] EXHIBIT A TO COMPLAINT

Articles of Incorporation of United States Spruce Production Corporation

Know all men by these presents, that we, the undersigned John E. Morley, Prescott W. Cookingham, and John P. Murphy, desiring to form a corporation under the laws of the State of Washington, for the purposes hereinafter set forth, do hereby make, subscribe and acknowledge, in triplicate, the following:

Articles of Incorporation

Article I

The corporate name adopted by this Corporation and under which it shall do business, shall be and is, United States Spruce Production Corporation.

Article II

The objects and purposes for which this Corporation is formed are as follows:

1. To manufacture, buy, sell and deal in aircraft, aircraft parts, aircraft materials and equipment of all kinds and to purchase, build, lease and otherwise acquire and own plants, mills and establishments therefor, and to operate the same.

2. To buy and sell logs, lumber cants, finished lumber products and any and all lumber products of any description whatsoever.

3. To engage in the logging business and incidental thereto, to build, construct, maintain and *and* operate logging railways; to [fol. 21] buy, rent, lease and sell all manner of logging equipment, logging supplies and to do any and all acts necessary or convenient to the logging business.

4. To engage in the milling business and to construct, buy, lease, rent, sell, maintain, equip and operate sawmills, cut-up mills, planing mills and any kind of mills or plants whatsoever, for handling, manufacturing or shaping lumber or wood products of any description.

5. To buy, lease and otherwise acquire, and to sell, lease, transfer, mortgage and otherwise dispose of any and all manner of interest in real property, wherever the same may be located, including stumpage timber lands, easements, rights-of-way, licenses and incorporeal rights of any description.

6. To buy, rent, build, maintain, repair and operate vessels, boats, barges, tugs and any water going craft of any description, and to sell, rent, mortgage or otherwise transfer the same at pleasure.

7. To borrow money and in return therefor to issue bonds, notes, debentures, certificates of indebtedness, ownership or participation, or any other form of evidence of participation or indebtedness covering money advanced, which may be convenient, secured, or otherwise, and, if secured, to give as security for the same or any part thereof, any or all of the corporate assets, corporeal or incorporeal, either by pledge, mortgage hypothecation, trust deed or otherwise.

8. To buy, subscribe for and otherwise acquire, and to sell, hypothecate, pledge or otherwise transfer stock, bonds, debentures; notes, or evidence of ownership or obligation in any corporation, [fol. 22] joint stock company, partnership or other business concern.

9. To accept shares of its own stock as security for debts and to foreclose the same, buying in the stock at foreclosure sale; to take the same over in satisfaction of debts or to acquire such stock in any other way and re-issue the same, if desired.

10. To buy, lease, construct or otherwise acquire any and all buildings or structures of any description whatsoever which may be necessary or convenient to carry out the purpose of the Corporation, and to sell, rent, mortgage or otherwise dispose of the same or any part thereof, as convenient.

11. To construct, buy or otherwise acquire and own and operate logging booms and to carry on logging, transportation and booming operations, rafting, towing an dany other logging and lumber transportation work.

12. To build, buy, lease, rent or otherwise acquire and to own, maintain and operate hotels, lodging houses, boarding houses, restaurants, stores and places of recreation and amusement and to dispose of the same in any manner whatsoever.

13. To build, buy, rent or otherwise acquire, and to own, maintain, equip and operate dock warehouses, elevators, terminal facilities and any other facilities necessary for loading, unloading or handling cargoes or other products being transported and to dispose of the same in any manner whatsoever.

14. To build, buy, rent or otherwise acquire, and to own, maintain and operate reservoirs, pipe lines, flumes, dams, and water systems of any description, and to dispose of the same in any manner whatsoever.

[fol. 23] 15. To locate, construct, buy, lease or otherwise acquire and to own, maintain and operate railroads of any description whatsoever, including steam and electric and to dispose of the same in any manner whatsoever.

16. To buy, construct, lease or otherwise acquire, and to own, maintain and operate telephone and telegraph lines and other means of communication, including wireless plants and to sell, lease or otherwise dispose of the same in any manner whatsoever.

17. To build, construct, buy, lease or otherwise acquire, and to own, operate, equip and maintain all water power and electric power plants, electric transmission lines and electric power and light systems, and to lease, sell, or otherwise dispose of the same in any manner whatsoever.

18. In general, to carry out a general manufacturing, selling, transportation, light and power business and to do any and all acts which may be necessary, convenient or desirable for carrying out any of the corporate purposes herein set forth.

Article III

The amount of the capital stock of this Corporation shall be Ten Million ($10,000,000) Dollars. The stock shall be divided into one hundred thousand (100,000) shares and the par value of each share shall be One hundred ($100) Dollars.

Article IV

The time for the existence of this Corporation shall be fifty (50) years.

Article V

The number of trustees of this Corporation shall be seven and the [fol. 24] names of the trustees, who shall manage the business of this Corporation up to and including the 31st day of December, 1918 are Brice P. Disque, C. P. Stearns, William M. Ladd, Amos G. Benson, Mark E. Reed, J. J. Donovan and Everett G. Griggs.

Article VI

The principal place of business of this Corporation shall be located in the City of Vancouver, County of Clarke, State of Washington.

In witness whereof, the undersigned have hereunto set their hands and seals this 19th day of August, 1918 in triplicate at Vancouver, Washington.

John E. Morley. (Seal.) Prescott W. Cookingham. (Seal.)
John P. Murphy. (Seal.)

STATE OF WASHINGTON,
County of Clarke, ss:

I, G. M. Whitmore, do hereby certify that on this 19th day of August, 1918, personally appeared before me John E. Morley, Prescott W. Cookingham, and John P. Murphy, to me known to be the individuals described in and who executed the foregoing Articles of Incorporation and acknowledged that they signed and sealed the same in triplicate, as their free, and voluntary act and deed for the uses and purposes therein mentioned.

Given under my hand and official seal this 19th day of August, 1918.

G. M. Whitmore, Notary Public. Commission Expires August 20, 1921. (Seal.)

[fol. 25] EXHIBIT A TO COMPLAINT—Continued

Certificate of Amendment of Articles of Incorporation of United States Spruce Production Corporation

The undersigned, Brice P. Disque, President and John E. Morley, Secretary, of U. S. Spruce Production Corp., a Corporation, duly organized and existing under and by virtue of the laws of the State of Washington, hereby certify that Article II of the original Articles of Incorporation of said U. S. Spruce Production Corporation, has been amended as set forth in the following resolution, to-wit:

Resolved, that the articles of incorporation of the U. S. Spruce Production Corporation be amended so as to change and amend Article II of said Articles of Incorporation to read as follows:

Article II

The objects and purposes for which this Corporation is formed are as follows:

The purchase, production, manufacture, and sale of aircraft, aircraft equipment, or materials therefor, and to build, own, and operate railroads in connection therewith and in general to do all acts and things which may be incidental to the carrying out of the foregoing

powers or which may be necessary, advantageous, desirable or convenient therefor.

In witness whereof, we have hereunto set our hands and affixed the seal of said Corporation this first day of November, 1918.

Brice P. Disque, John E. Morley. (Corporate Seal.)

[fol. 26] STATE OF OREGON,
County of Clatsop, ss:

I, Perry S. Olson being first duly sworn, depose and say that I am one of the plaintiffs in the above entitled action and that the foregoing complaint is true as I verily believe.

Perry S. Olson.

Subscribed and sworn to before me this 30 day of March, 1922. John C. Murphy, Notary Public for the State of Oregon. My Commission expires April 5, 1924. (Notarial Seal.)

STATE OF OREGON,
County of Multnomah, ss:

I, John C. Murphy, one of Plaintiff's attorneys, do hereby certify that in my opinion the foregoing is well founded in law.

John C. Murphy.

[File endorsement omitted.]

[fol. 27] IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR THE COUNTY OF MULTNOMAH

[Title omitted]

ORDER OF REMOVAL—Apr. 10, 1922

The defendant, United States Spruce Production Corporation having presented to this Court its petition for the removal of this cause to the District Court of the United States for the District of Oregon, and having tendered with such petition a bond with good and sufficient surety in the penal sum of one thousand dollars ($1,000.00) conditioned upon the filing in the said District Court of the United States for the District or Oregon within thirty days from the date of filing the said petition of a certified copy of the record in this cause, and upon payment of any costs that may be awarded by the [fols. 28 & 29] said District Court, if it shall hold that said cause was wrongfully or improperly removed thereto;

Now, therefore, this court hereby accepts said petition and hereby approves said bond and proceeds no further in this cause, and it is ordered, that the clerk of this court be and he is hereby directed

to prepare and transmit to the said District Court of the United States for the District of Oregon a copy of the record in this cause.

Dated April 10, 1922.

By the Court:

Robert Tucker, Judge.

[File endorsement omitted.]

[fol. 30 & 31] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

DEMURRER—Filed June 9, 1922

Comes now the defendant, United States Spruce Production Corporation and demurs to the complaint filed herein and for ground of demurrer states that the complaint does not contain facts sufficient to constitute a cause of action against this defendant in this: That the said complaint does not show that any cause of action ever arose against this defendant, or that this defendant is liable in any pretended cause of action, or that any cause of action now exists in favor of the plaintiffs.

Carey & Kerr, Omar C. Spencer, Attorneys for Defendant.

Dated June 9, 1922.

STATE OF OREGON,
County of Multnomah, ss:

Due service of the within demurrer is hereby accepted in Multnomah County, Oregon, this 9th day of June, 1922, by receiving a copy thereof, duly certified to as such by Omar C. Spencer, of attorneys for defendant.

O. A. Neal, of Attorneys for Plaintiffs.

[File endorsement omitted.]

[fol. 32] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

OPINION—Filed January 2, 1923

WOLVERTON, District Judge:

This is an action to recover for losses alleged to have been sustained by plaintiffs, by reason of having, under the direction of the Spruce Production Division, acting in pursuance of orders of the War

Department, devoted their time and energy and the use of their logging equipment and employees, in the production of spruce logs for airplane and war purposes, with the agreemnt and promise on the part of said Spruce Production Division that they would be reimbursed for all such losses and damages sustained by them. The defendant, United States Spruce Production Corporation, was later organized and incorporated under the laws of the State of Washington, and duly admitted and licensed to do and transact business in the State of Oregon, and took over in its entirety the work and property of the Spruce Production Division, and continued in the activities of promoting the production of spruce logs and lumber for the construction of airplanes for war purposes.

The defendant challenges the sufficiency of the complaint, on three grounds. In view of the conclusion reached, it is necessary to [fol. 32½] advert to but one of them.

By the Act of March 2, 1919 (40 Stat. 1272), known as the Dent Act, the Secretary of War was authorized to adjust, pay or discharge, upon a fair and equitable basis, any agreement, express or implied, that had been entered into in good faith during the war emergency, prior to November 12, 1918, by any officer or agent acting under his authority or direction, or that of the President, with any person, firm or corporation, for the acquisition of lands or the use thereof, or for damages resulting from notice by the Government of its intention to acquire or use such lands, or for the production, manufacture, sale, acquisition, or control of equipment or supplies, or for services, or other purposes connected with the prosecution of the war, when such agreement has been performed in whole or in part, or expenditures have been made or obligations incurred upon the faith of the same, by any such firm or corporation prior to November 12, 1918, and such agreement has not been executed in the manner prescribed by law: Provided, "That in no case shall any award either by the Secretary of War, or the Court of Claims include prospective or possible profits on any part of the contract beyond the goods and supplies delivered to and accepted by the United States and a reasonable remuneration for expenditures and obligations or liabilities necessarily incurred in performing or preparing to perform said contract or order;" and provided further, "That this Act shall not authorize payment to be made of any claim not presented before June 30, 1919."

Section 2 of the Act provides:

[fol. 33] "That the Court of Claims is hereby given jurisdiction on petition of any individual, firm, company or corporation referred to in Section 1 hereof, to find and award fair and just compensation in the cases specified in said section in the event that such individual, firm, company or corporation shall not be willing to accept the adjustment, payment or compensation offered by the Secretary of War as hereinbefore provided, or in the event that the Secretary of War shall fail or refuse to offer a satisfactory adjustment, payment or compensation as provided for in said section."

If it be conceded that the United States Spruce Production Corporation is a governmental agency, not possessing the attributes of sovereignty, and subject to be sued in the courts, as the Fleet Corporation is, yet I am persuaded that the Dent Act has provided, and was intended to provide, a complete remedy for claimants of plaintiffs' class, by which their claims may be adjusted, and also a tribunal in which to sue for the appropriate relief. The statute seems to cover the whole subject respecting the settlement and adjustment of such claims, and specifies the time in which they shall be presented for determination. It is hardly possible that Congress intended that such claims should be sued on at a later date, and be subject to litigation in another tribunal. A complete procedure is prescribed by the act for their adjustment, and the Court of Claims is made the final arbiter, in case the claimant is not willing to accept the adjustment of the Secretary of War, or even should the Secretary of War refuse to offer a satisfactory adjustment. Obviously, the procedure prescribed was designed to be exclusive of the law courts.

[fols. 34 & 35] Reference is made in counsel's brief to a letter of the Honorable Secretary of War, who indicates that in his view such claimants may have recourse to the state or Federal courts. Evidently, however, he has overlooked the plain provisions of section 2 of the act, giving to the Court of Claims jurisdiction in the premises, and to claimants the right to apply thereto for further relief.

The complaint shows that claimants presented their claim to the Secretary of War, and that final hearing was had before the claim board, and the claim disallowed. Without proceeding further, claimants are seeking to prosecute their claim in this court. This is not a case of election of remedies, nor of the tribunal wherein to proceed, for there is but one remedy prescribed, and but one tribunal in which plaintiffs are entitled to seek relief.

Demurrer sustained.

[File endorsement omitted.]

[fols. 36 & 37] In the District Court of the United States

[Title omitted]

Order Sustaining Demurrer—January 2, 1923

This cause was heard by the court upon the demurrer of the defendant to the complaint herein, and was argued by Mr. O. A. Neal and Mr. John C. Murphy, of counsel for the plaintiffs, and by Mr. Omar C. Spencer, of counsel for the defendant;

On consideration whereof it is ordered and adjudged that said demurrer be, and the same is hereby, sustained. Whereupon, on motion of said plaintiffs it is ordered that they be, and are hereby allowed ten days from this date in which to file an amended complaint herein.

[fol. 38] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

MOTION FOR REHEARING ON DEMURRER—Filed January 12, 1923

Now come the plaintiffs and move the Court for an order setting aside the order heretofore made here in sustaining the demurrer filed herein by the defendant and for rehearing upon said demurrer for the following reasons, to-wit:

I

The defendant's demurrer was upon the ground as stated therein, to-wit:

"That the complaint does not state facts sufficient to constitute a cause of action against the defendant in this: That the complaint does not show that any cause of action ever arose against this defendant or that this defendant is liable in any pretended cause of action, or that any cause of action now exists in favor of plaintiff."

The Court in its opinion sustains this demurrer. But the opinion, as we understand it, does not undertake to pass upon the question whether the complaint states a cause of action but is put purely upon the question of the jurisdiction of this court and holds that this court has not jurisdiction on account of the Dent Act, but that the only Court vested with jurisdiction to hear the claim of the plaintiffs was the Court of Claims. We therefore submit to the Court that it was erroneous to sustain a demurrer which did not even [fol. 39] raise the question of jurisdiction and if it would be assumed that jurisdiction is a question that can be raised at any time, which we concede, still we submit it would not be proper to sustain a demurrer based upon the ground that the complaint did not state a cause of action when the decision was based upon the question of jurisdiction solely.

II

This action is not brought by the plaintiffs against the United States Government or the United States Spruce Production Division, but is an action solely against the United States Spruce Production Corporation, a corporation organized under the laws of the State of Washington by John E. Morely, Prescott W. Cookingham and John P. Murphy as a purely commercial corporation as shown by its Articles. It is alleged in the complaint that the said corporation took over and assumed control of and undertook the work theretofore carried on by the Spruce Production Division, to carry out and perform all agreements and promises or contracts theretofore made by said officers acting for said division and thereupon con-

tinued to carry on and/or direct said work and further promised and assured plaintiffs that they would be compensated therefor and thereby ratified and confirmed all that had been done theretofore, and that on or about November 15, 1918, said defendant corporation notified plaintiff to cease to operate and to send in to the defendant their claim for damages caused during said operations, all of which is fully set forth in the complaint on file herein.

It is the plaintiffs' contention that when the United States Spruce Production Corporation was organized under the laws of the State of Washington, that it had under the laws of the State of Washington, the right to sue and be sued and it is further their contention that Congress has no authority whatever to pass any act undertaking [fol. 40] to change a state statute or the powers conferred thereby or the liability necessarily flowing therefrom and that the statute of Washington authorizing suits by and against corporations for liabilities incurred by them still remains in full force and effect as to this defendant, notwithstanding any construction the Court may see fit to place upon the Dent Act. If the right which the plaintiff had to sue the defendant corporation under the laws of the State of Washington had been given by an act of Congress rather than by the statute of the State of Washington, then we would admit that Congress might have the power to take away that right or to change the remedy but this corporation was not organized by any act of Congress but purely under the statute of the State of Washington.

The Government was not even an incorporator but is only a stockholder therein holding practically all of the stock, and we submit that when the defendant corporation assumed control of the plaintiffs' logging camp and the manner of operation thereof and promised and agreed with plaintiffs that they would be compensated for such damages as they might suffer, it thereupon became liable to be sued in the State or Federal Courts by the plaintiffs for such liability.

III

It is further our contention that an act of Congress known as the Dent Act was never intended by Congress to apply to valid existing claims for such claimants already had a remedy for their collection but was only intended to apply to claims where goods, supplies, etc. had been accepted by the Government and no agreements had been entered into in the manner prescribed by law, in which case the person, firm or corporation furnishing the goods, supplies, etc. had no remedy against the Government whatever.

[fol. 41] It is our contention in this case, as far as the Dent Act is concerned, as we stated at the hearing that it has nothing whatever to do with a claim against the United States Spruce Production Corporation, and could as well have been eliminated from the complaint as far as it affects the rights of the plaintiffs herein to maintain their action against the defendant, as it is our contention that the rights of the plaintiffs does not in any wise arise under or pursuant to the terms of the Dent Act and the only possible effect that the

Dent act could have upon the plaintiffs right to maintain their action is involved in the question of whether or not there was an election of remedies.

The United States Spruce Production Corporation was just like any other corporation. It had no greater rights and no less rights. It could contract liabilities and assume obligations the same as any other corporation and when it promised and agreed to pay plaintiffs for damages which they might suffer by reason of operation of their logging camp it became liable for such damage and under the statute of the State of Washington authorizing it to be sued the plaintiffs have a right to sue said corporation in either State or Federal Court. The corporation is a separate entity and has no connection whatever with the Government.

IV

It is further our contention that an Act of Congress which does not create a new right (and the Dent Act does not create a new right insofar as the right of the plaintiffs to sue the defendant corporation pursuant to statute of the State of Washington is concerned, because prior to the Dent Act plaintiffs had the right to sue the corporation for any claim they might have against it) but only gives a new remedy where a remedy already existed under the laws of Washington, and as before stated it is our contention that insofar as the [fol. 42] Dent Act applies to the question where there was already a remedy, the remedy given by the Dent act is only cumulative.

It is further our contention that the right of plaintiffs to sue the defendant which existed under the laws of the State of Washington could not, under any circumstances, be taken away from the plaintiffs by the Act of Congress. We will concede that if plaintiffs' right to sue the corporation in Federal or State Courts had existed only by virtue of an Act of Congress, then Congress might have changed this remedy so as to require plaintiffs to sue in the Court of Claims but such are not the facts. The very act of the State of Washington under which the corporation was organized gave plaintiffs the right to sue said corporation on any valid claim they might have and this right given by the state statute cannot be taken away by an Act of Congress.

V

It is further our contention that any attempt on the part of Congress to set aside or repeal by implication or direct legislation, a state statute authorizing a corporation to sue and be sued, would be absolutely unconstitutional and void.

John C. Murphy, O. A. Neal, Attorneys for Plaintiffs.

Jurat showing the foregoing was duly sworn to by O. A. Neal, omitted in printing.

[fols. 43 & 44] STATE OF OREGON,
County of Multnomah, ss:

Due service of the within motion is hereby accepted in Multnomah County, Oregon, this 12th day of January, 1923, by receiving a copy thereof, duly certified to as such by O. A. Neal, of Attorneys for Plaintiffs.

Carey & Kerr & O. C. Spencer, Attorney- for Defendant.

[File endorsement omitted.]

[fols. 45 & 46] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

ORDER DENYING PETITION FOR REHEARING ON DEMURRER—March 26, 1923

This cause was heard by the Court on the petition of plaintiff for a rehearing on demurrer to the complaint herein, and was argued by Mr. O. A. Neal and Mr. John C. Murphy, of counsel for the plaintiffs, and by Mr. Omar C. Spencer, of counsel for defendant; and the Court, having heard the arguments of counsel, upon consideration thereof,

It is ordered that said petition for a rehearing on the demurrer to the complaint herein be, and the same is hereby, denied.

[fol. 47] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

MOTION FOR LEAVE TO FILE AMENDED COMPLAINT—Filed April 3, 1923

Comes now the plaintiffs and tenders herein an amended complaint and moves the Court for an order permitting plaintiffs to file same herein.

John C. Murphy, O. A. Neal, Attorneys for Plaintiffs.

STATE OF OREGON,
County of Multnomah, ss:

Due service of the within Motion is hereby accepted in Multnomah County, Oregon, this 5th day of April, 1923, by receiving a copy thereof, duly certified to as such by O. A. Neal, of Atorneys for Plaintiffs.

Carey & Kerr, Attorney- for Defendant.

[File endorsement omitted.]

[fol. 48] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

AMENDED COMPLAINT—Lodged April 5, 1923

Now come the Plaintiffs, leave of Court being first obtained and files herein their amended complaint and for cause of action against the defendant allege:

I

That the plaintiffs, during all the times and dates herein mentioned were partners doing business under the firm name and style of Olson Bros., and/or Olson & Olson. That said plaintiffs are now and have been during all the times herein mentioned, residents and citizens of the State of Oregon.

II

That the Defendant is a corporation organized and existing under the laws of the State of Washington, and organized by the Director of Aircraft Production, under and pursuant to the Act of Congress of July 9, 1918, (U. S. Compiled Statutes, 1918, Compact Edition Appendix, Page 1771), for the purchase, production, manufacture and sale of aircraft, aircraft equipment or materials therefor, and also duly authorized to transact business in the State of Oregon, a copy of which said Articles of Incorporation and a supplement article are hereto attached, marked Exhibit A, hereby referred to and made a part hereof, by reference thereto, and is a citizen of the State of Washington.

III

That under and pursuant to the Acts of Congress, and particularly [fol. 49] to the Acts of Congress approved April 11, 1918, and as amended by the Act of Congress of July 9, 1918, the Secretary of War was authorized to acquire war material which, under the Act of Congress of July 1, 1918, (Compact Edition Section 3115, 1/16) includes "Arms, armaments, ammunition, store supplies and equipment for ships and airplanes and everything required for or in connection with the production thereof" including standing or fallen timber, sawmills, camps, machinery, logging roads, logging railroads and equipment, materials and supplies and any works, property or appliances suitable for the effectual production of such lumber and timber products for the Army of the United States.

IV

That acting under and pursuant to said Acts of Congress, and the authority conferred upon the War Department of the United States Government, a Department known as the Spruce Production Division, with offices and headquarters at Portland, Oregon, and which Department under and pursuant to the provisions of said Acts

of Congress and the authority given to the War Department, was incorporated, and thereafter known as the United States Spruce Production Corporation, and that during all the times herein mentioned, Colonel Brice P. Disque, later Brigadier General Brice P. Disque, was in charge and command of said Spruce Production Division, and later acted as President and Manager of said Spruce Production Corporation and had supervision and control and directed its operations.

V

That during all the times herein mentioned, said Olson Bros., Plaintiffs, were conducting a logging camp and logging operations near Seaside, Oregon, and on March 1, 1918, were carrying on logging operations upon that certain real property described as Section Eleven (11), Township Six (6) Range Ten (10), West Willamette [fol. 50] Meridian, and Section Two (2), Township Six (6), Range Ten (10), West Willamette Meridian, in Clatsop County, Oregon. That there was, on March 1, 1918, located upon said Section 11, approximately 12,000,000 feet of merchantable Spruce and Hemlock timber, 75 to 80 per cent of which was Hemlock, and that there was approximately 8,000,000 feet of merchantable Spruce and Hemlock timber located upon said Section 2, 75 to 80 per cent of which was Hemlock. That on and prior to March 1, 1918, the said plaintiffs, Olson Bros., had entered into a contract with the Prouty Lumber & Box Company, to cut and deliver to the said Prouty Lumber & Box Company, all merchantable Spruce and Hemlock timber, located on said Sections 11 and 2, as aforesaid. That the Plaintiffs, on and prior to March 1, 1918, for the purpose of removing said timber had furnished material for and constructed railroad tracks for a distance of approximately one and one-half miles, had placed the donkey engines, rollways and equipment, approximately on to the center of said section 11, and had cut, sawed, bucked into logs, ready for transportation over said railroad, approximately 5,000,000 feet of Hemlock and Spruce logs, and had upon the ground all necessary equipment for removing same, in compliance with their said contract, and had worked about one or two days hauling logs to rollway, and had expended upon construction of said railroad, and placing said equipment upon said section 11, the sum of $18,000.00 and had expended the sum of approximately $6,750.00 in cutting and bucking said 5,000,000 feet of timber into logs.

VI

That on or about March 1, 1918, Brigadier General Brice P. Disque, or Colonel Brice P. Disque, as his title may have been at that time, acting under the authority of the War Department and/or said Acts of Congress, and/or under the directions of the Director of Aircraft Production, organized under and pursuant to the said [fol. 51] Acts of Congress, then being in charge and/or command of the Spruce Production Division with offices and headquarters at Portland, Oregon, sent, or caused to be sent to the logging camp

of the Plaintiffs, certain soldiers and an officer of the Army of the United States, under his command, to-wit: Lieutenant J. C. Smith, which officer notified the plaintiffs that they could no longer cut and remove hemlock timber under and pursuant to their contract with the Prouty Lumber & Box Company, and that unless they confined their operations exclusively to the cutting of airplane spruce that it would be commandeered and taken over by the Government and at the same time informed plaintiffs that the plaintiffs in going ahead and getting out airplane spruce exclusively would be reimbursed by the Government.

VII

That the plaintiffs, acting upon said directions and promise of compensation for any losses that might be suffered by them thereupon abandoned their attempt to remove all of the merchantable timber from said two sections of land and thereafter devoted their entire time and energy and the use of their money and equipment and employment of all their employees to getting out airplane spruce logs exclusively from March 1, 1918 to November 12, 1918. That the plaintiffs between said dates carried out and performed all the directions and instructions given to them by said Lieutenant Smith and other Lieutenants sent to their camp under the direction of said General Brice P. Disque, acting for and on behalf of the Spruce Production Division and/or later for said defendant. That the plaintiffs were directed by said officers to, and did leave upon the ground upon said Section 11, all the merchantable hemlock timber [fol. 52] cut and bucked by them as aforesaid and all the standing merchantable hemlock timber and considerable merchantable spruce not considered fit for airplane stock, and took up and removed approximately 1,200 feet of said railroad tracks so constructed by them as aforesaid, and constructed and placed rails upon some 3,000 feet of new railroad including two trestles, leading on to said Section 2 and removed its donkey engines and equipment from said Section 11 on to said Section 2, at an additional cost to plaintiffs of approximately $6,500.00, for all of which the plaintiffs paid and at the request and under the direction and instructions of said officers, and with the understanding and agreement that they would be compensated for any loss that they might suffer by reason thereof. That the plaintiffs in tearing up and removing said railroad from said Section 11, and from leaving upon the ground all merchantable hemlock timber cut and bucked into logs on said Section 11 as aforesaid, and in being thereby prevented and/or being unable to remove said merchantable hemlock timber from said Section while said railroad was constructed thereon and could be used to transport same, thereby lost all of the cost of constructing said railroad on to said Section 11, amounting to the sum of approximately $18,000.00 and the cost of cutting and bucking said timber into logs as aforesaid, amounting to the sum of approximately $6,750.00 and all the profit which plaintiffs would reasonably have made upon

said 12,000,000 feet of said merchantable timber if they could have continued removing same therefrom, amounting to the reasonable value of the sum of $4.00 per 1,000 feet or the sum of $48,000.00 was lost to plaintiffs by reason thereof.

VIII

That plaintiffs were instructed and requested by said officers to get out and remove only No. 1 and No. 2 Spruce which required the carrying on what is known as selective logging and which required the leaving upon the ground of a large amount of merchant-
[fol. 53] able spruce timber and all merchantable hemlock timber. That from March 1, 1918, to November 12, 1918, while plaintiffs were carrying on logging operations under the direction of said officers as aforesaid, they were able to get out only approximately 2,500,000 feet of spruce for which they received pay in the sum of $7.50 per 1,000 feet or the sum of approximately $18,750.00. That the cost to plaintiffs in labor and in operating said logging camp during said time, not including the cost of removing said railroad and equipment was at least the sum of $5,000.00 per month, and the plaintiffs thereby lost and were damaged in the further sum of $21,250.00.

IX

That the plaintiffs were requested, required, and/or directed by said officers representing said defendant corporation to furnish approximately 6,000 feet of lumber of the reasonable value of $30.00 per 1,000 feet and to haul same to said camp at an additional cost of $10.00 per 1,000 feet for the purpose of constructing bunkers for said soldiers employed in said camp, which bunkers were required to have an air space of 500 cubic feet per soldier, as required and directed by said officers, and plaintiffs were required to and did pay for the construction thereof approximately the sum of $120.00 and furnished hardware therefor of the value of $15.00 making a total expense to plaintiffs by reason thereof the sum of $375.00 and that the plaintiffs were ordered, directed and/or requested to construct shower bath apartments at the cost to plaintiffs of $50.00 which the plaintiffs did construct as requested. That said plaintiffs were requested and directed to assemble upon the ground in said camp, material for construction of a Recreation Hall, for use of said soldiers employed in said camp, and at the time of the Armistice had assembled material therefor of the reasonable value of $200.00, all at the cost and expense of the plaintiffs and which was a total loss to the plaintiffs.

[fol. 54] X

That the plaintiffs, acting under and carrying out the orders and instructions of said officers representing said defendant, were required and requested to cut said spruce timber into logs in lengths

of 20, 22, 24 and 26 feet, and approximately 80 per cent in lengths of 20 to 24 feet. That in carrying on their logging operations prior to March 1, 1918, plaintiffs were cutting logs in 32 to 44 feet, the average being approximately 32 feet. That the additional cost of logging said spruce timber in short lengths as directed and requested by said officers representing said defendant was approximately 33⅓ per cent more to the plaintiffs.

XI

That on March 1, 1918, when said officers came to plaintiffs' camp as aforesaid, the plaintiffs were the owners of logging equipment of the approximate value of $32,000.00 and that on November 12, 1918, when plaintiffs were notified to cease operations by said officers of the United States Spruce Production Corporation, plaintiffs were indebted to the Prouty Lumber & Box Company for moneys advanced to them to carry on said logging operations in the sum of $32,000.00 and the plaintiffs in order to settle said indebtedness turned over to the said Prouty Lumber & Box Company all of the said equipment of the approximate value of $32,000.00 and thereby lost all the equipment and property held by them at time said operations were commenced on March 1, 1918.

XII

That by reason of said operations under the directions and/or by the request of said officers representing said defendant, the plaintiffs lost all the profit which they would have made by removing all the [fol. 55] merchantable timber on said lands not removed therefrom and by reason of all the acts aforesaid, the plaintiffs have been reasonably damaged in the sum of $60,000.00 for which it was promised and agreed by said officers representing said Division and said defendant company that the plaintiffs would be compensated for such damages as they might suffer by said defendant and/or said Spruce Production Division.

XIII

That on or about the 19th day of August, 1918, said United States Spruce Production Corporation was organized as a Corporation under the laws of Washington as aforesaid and under and pursuant to the said Act of Congress of July 9, 1915, and thereafter took over and assumed control of and undertook the work theretofore carried on and/or directed by said Spruce Production Division to carry out and perform all the agreements and promises and/or contract theretofore made by said officers aforesaid acting under said Spruce Production Division made to plaintiffs and acting by and through the same officers, thereupon continued to carry on and/or direct said work, further promised and assured plaintiffs that they would be compensated therefor, and continued to carry on said logging operations in the same manner as had been done prior thereto and thereby ratified and confirmed all that had been theretofore done and/or promised by said

Spruce Production Division to and with the plaintiffs and that on or about November 15, 1918, after the Armistice and after plaintiffs had been notified that they should cease work at said camp, and after said defendant had ceased to operate and/or direct the operations at said camp, the said defendant, United States Spruce Production Corporation acting by Brigadier General Disque, notified plaintiffs to send into defendant their claim for damages and thereby ratified and confirmed said promise of compensation.

[fols. 56–60] XIV

That the amount involved in this controversy exclusive of interest and costs is more than $3,000.00.

Wherefore, the plaintiffs demand judgment against the defendant for the sum of $60,000.00, damages suffered by the plaintiffs by reason of the acts herein alleged, together with the costs and disbursements herein.

John C. Murphy, O. A. Neal, Attorneys for Plaintiffs.

EXHIBIT A TO AMENDED COMPLAINT—Omitted; printed side page 20 ante

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[fol. 61] EXHIBIT A TO AMENDED COMPLAINT—Continued; omitted; printed side page 25 ante

[fols. 62 & 63] Jurat showing the foregoing was duly sworn by O. A. Neal omitted in printing.

STATE OF OREGON,
County of Multnomah, ss:

Due service of the within proposed amended complaint is hereby accepted in Multnomah County, Oregon, this 5th day of April, 1923, by receiving a copy thereof, duly certified to as such by O. A. Neal, of Attorneys for Plaintiffs not waiving objection to the filing thereof.

Carey & Kerr, Attorney- for Defendant.

[File endorsement omitted.]

[fols. 64 & 65] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

ORDER DENYING MOTION FOR LEAVE TO FILE AMENDED COMPLAINT—April 16, 1923

Now, at this day, this cause comes on to be heard by the court upon the motion of plaintiff for leave to file an amended complaint

herein, plaintiffs appearing by Mr. O. A. Neal, of counsel, and defendant by Mr. Omar C. Spencer, of counsel; and the Court having heard the arguments of counsel, and being fully advised in the premises, upon consideration thereof,

It is ordered that said motion be, and the same is hereby denied.

[fol. 66] In the District Court of the United States

[Title omitted]

Objections to Form of Proposed Judgment

Now come the plaintiffs, by their attorneys John C. Murphy and O. A. Neal, and object to the form of judgment of dismissal tendered herein for entry by the defendant, for the reason and on the ground that the same is not in accordance with the facts in this, to-wit:

The Court in its decision made herein, a copy of which is hereto attached marked Exhibit "A", based its order sustaining the demurrer herein upon the ground that the plaintiffs' remedy, if any, was in the Court of Claims and that therefore this Court did not have jurisdiction and plaintiffs object to the order submitted herein by the defendant for the reason that it fails to show upon its face, that the judgment of dismissal entered herein is based upon the ground of lack of jurisdiction of the above entitled Court.

John C. Murphy, O. A. Neal, Attorneys for Plaintiffs.

[fols. 67-69] In the District Court of the United States

[Title omitted]

Opinion—Filed April 25, 1923; omitted; printed side page 31 ante

[fols. 70 & 71] [File endorsement omitted.]

[fols. 72 & 73] In the District Court of the United States

[Title omitted]

Judgment of Dismissal—Filed April 30, 1923

It appearing to the court that the demurrer to the complaint was heretofore sustained by order of this court dated January 2, 1923, and thereafter an application for rehearing on said demurrer was denied, and it further appearing that no amended complaint

was filed or tendered within ten days from January 2, 1923, and no order was taken extending the time for the filing of the amended complaint, and the court having denied the motion of plaintiffs to file an amended complaint filed herein on April 5, 1923, and the time for further pleading by the plaintiffs having expired,

Now therefore upon application of counsel for defendant it is ordered that this action be and the same is hereby dismissed and that defendant recover from plaintiff its costs and disbursements and execution issue therefor.

Dated April 30, 1923.

R. S. Bean, District Judge.

Service accepted Apr. 24, 1923. O. A. Neal, by Anna G. Weinstein, Attorney for Plaintiffs.

[File endorsement omitted.]

[fols. 74 & 75] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

PETITION FOR WRIT OF ERROR—Filed June 14, 1923

Now comes Perry S. Olson and Ben S. Olsen, partners doing business under the firm name and style of Olson Bros., or Olson & Olson, plaintiffs herein, and say:

That on or about the 30th day of April, 1923, the District Court of the United States for the District of Oregon entered a judgment herein in favor of the defendant and against these plaintiffs, in which judgment and the proceedings had prior thereto in this cause, certain errors were committed to the prejudice of these plaintiffs, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore, these plaintiffs pray that a writ of error may issue in this behalf out of the Supreme Court of the United States for the correction of errors so complained of and that a transcript of the records and the proceedings and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States.

John C. Murphy, O. A. Neal, F. C. Salway, Attorneys for Plaintiffs.

DISTRICT OF OREGON,
County of Multnomah, ss:

Due service of the within Petition for Writ of Error is hereby accepted in Multnomah County, Oregon, this 14th day of June, 1923, by receiving a copy thereof, duly certified to as such by O. A. Neal, Attorney for Plaintiff.

Carey & Kerr, Omar C. Spencer, Attorney-for-Deft.

[File endorsement omitted.]

[fol. 76] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

ASSIGNMENT OF ERRORS—Filed June 14, 1923

The plaintiffs in this action, in connection with their petition for writ of error, make the following assignment of errors, which they aver exist:

1. The Court erred in sustaining the demurrer of the defendant.

2. The Court erred in dismissing plaintiffs' action.

3. The Court erred in conceiving that it was without jurisdiction or power to entertain the action.

4. The Court erred in conceiving and adjudging that the Court of Claims of the United States had exclusive jurisdiction to entertain the action.

Wherefore, the plaintiffs pray that said judgment be reversed.

John C. Murphy, O. A. Neal, F. C. Salway, Attorneys for Plaintiffs.

DISTRICT OF OREGON,
County of Multnomah, ss:

Due service of the within Assignment of Error is hereby accepted in Multnomah County, Oregon, this 14th day of June, 1923, by receiving a copy thereof duly certified to as such by O. A. Neal, Attorney for Plaintiffs.

Carey & Kerr and Omar C. Spencer, Attorney for ——.

[File endorsement omitted.]

[fols. 77–80] BOND ON WRIT OF ERROR FOR DAMAGES AND COSTS—Approved and filed June 14, 1923; omitted in printing

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[fols. 81 & 82] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING WRIT OF ERROR—Filed June 14, 1923

This 14 day of June, 1923, comes the plaintiffs by their attorneys and file herein and present to the Court their petition praying for the allowance of a writ of error, and the assignment of errors intended to be urged by them, praying also that a transcript of the records and

proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had as are proper in the premises.

On consideration whereof the Court does allow the writ of error upon the plaintiffs giving a bond according to law in the sum of $500.00 which shall operate as a supersedeas bond.

Chas. E. Wolverton, Judge.

DISTRICT OF OREGON,
County of Multnomah, ss:

Due service of the within order, Writ of Error from the Supreme Court to the District Court is hereby accepted in Multnomah County, Oregon, this 14th day of June, 1923, by receiving a copy thereof, duly certified to as such by O. A. Neal of Attorney for plaintiffs.

Carey & Kerr, Omar C. Spencer, Attorney- for Defendants.

[File endorsement omitted.]

[fol. 83] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

CERTIFICATE OF DISTRICT JUDGE CERTIFYING THE QUESTION OF JURISDICTION—Filed June 14, 1923

Be it remembered, that on the 30th day of April, A. D. 1923, this cause came on to be heard upon the motion of the defendant, United States Spruce Production Corporation, a corporation, defendant, to dismiss the said action, which dismissal was based upon the ground that the District Court of the United States for the District of Oregon had no jurisdiction as a Federal Court over the subject matter of the cause and the Court upon due consideration of said motion and after hearing argument of counsel sustained the same on the sole ground that this Court had no jurisdiction of said cause as a Federal Court and accordingly directed that a judgment be made and entered herein dismissing said action for want of jurisdiction for the reason that the Court held plaintiffs' only remedy was in the Court of Claims of the United States and that pursuant thereto an order of dismissal was duly made and entered herein in which it was considered, ordered and adjudged that said action be and the same was thereby dismissed for the reason aforesaid, for want of jurisdiction, and this ruling of the Court is hereby certified to the Supreme Court of the United States and the opinion filed herein is made a part of the record and will be certified and sent up as a part of the proceedings together with this certificate.

I hereby certify that the matter in controversy herein as shown [fols. 84 & 85] by the record, exceeds in values $10,000.00 exclusive of interests and costs.

Dated this 14 day of June, 1923.

Chas. E. Wolverton, Judge of the United States District Court for the District of Oregon.

District of Oregon,
County of Multnomah, ss:

Due service of the within Certificate of District Judge certifying question of Jurisdiction is hereby accepted in Multnomah County, Oregon, this 14th day of June, 1923, by receiving a copy thereof, duly certified to as such by O. A. Neal of Attorneys for plaintiffs.

Carey & Kerr, Omar C. Spencer, Attorney- for Defendant.

[File endorsement omitted.]

[fol. 86] In the District Court of the United States

[Title omitted]

Præcipe for Record—Filed March 14, 1923

The Clerk of this Court is hereby directed to prepare and certify a transcript of the records in the above entitled case for use of the Supreme Court of the United States by including therein the following:

Complaint filed in the Circuit Court of the State of Oregon for Multnomah County, on April 1, 1922.

Order of removal to the District Court of the United States for the District of Oregon, entered April 10, 1922, by said Circuit Court.

Demurrer filed to complaint on June 9, 1922, in the District Court of the United States for the District of Oregon.

Opinion of Court filed January 2, 1923.

Order sustaining demurrer entered in the District Court on January 9, 1923.

Motion for rehearing on demurrer, filed January 12, 1923.

Order denying motion for rehearing on demurrer, entered in the District Court on March 26, 1923.

Amended complaint tendered for filing in the District Court on April 5, 1923.

Motion asking for order to file amended complaint, filed in the District Court on April 5, 1923.

Order entered in the District Court on April 16th, 1923, denying [fols. 87 & 88] leave to file amended complaint.

Motion objecting to form of order of dismissal filed in the District Court on April 25, 1923.

Order of dismissal entered in the District Court on April 30, 1923.
Petition and writ of error filed on June 14th, 1923.
Assignment of error filed on the same date.
Order allowing writ of error filed June 14th, 1923.
Bond on writ of error filed June 14th, 1923.
Certificate of District Judge certifying the question of jurisdiction filed June 14th, 1923.
Citation issued on June 14th, 1923.
Dated at Portland, Oregon, this 14th day of June, 1923.

John C. Murphy, O. A. Neal, F. C. Salway, Attorneys for Plaintiffs.

[File endorsement omitted.]

[fol. 89] In the District Court of the United States for the District of Oregon

[Title omitted]

Notice of Filing of Præcipe and Service—Filed June 14, 1923

To J. B. Kerr, Chas. H. Carey, and Omar C. Spencer, attorneys for defendant:

Please take notice that on the 14 day of June, 1923, the undersigned filed with the Clerk of this Court a præcipe for record to be transmitted to the Supreme Court of the United States on the writ of error sued out in the above cause, a copy of which præcipe is herewith served on you.

Dated this 14 day of June, 1923.

John C. Murphy, O. A. Neal, F. C. Salway, Attorneys for Plaintiffs Above Named.

Service of the within notice and copy of præcipe is hereby accepted this 14 day of June, 1923.

Carey & Kerr, Omar C. Spencer, Attorneys for Defendant United States Spruce Production Corporation.

[File endorsement omitted.]

[fol. 90] United States of America,
District of Oregon, ss:

Clerk's Certificate

I, G. H. Marsh, Clerk of the District Court of the United States for the District of Oregon, pursuant to the foregoing writ of error and

in obedience thereto, do hereby certify that the foregoing pages, numbered from 7 to 89 inclusive constitute the transcript of record upon said writ of error, in the case in said Court in which Perry S. Olson and Ben S. Olson, partners doing business under the firm name and style of Olson Bros., or Olson & Olson, are plaintiffs and plaintiffs in error, and the United States Spruce Production Corporation, a corporation, is defendant and defendant in error; that the said transcript has been prepared by me in accordance with the præcipe for transcript filed by the said plaintiff in error, and it is a full, true and correct transcript of the record and proceedings had in said Court in said cause, in accordance with the said præcipe, as the same appear of record and on file at my office and in my custody.

I further certify that the cost of the said transcript is $22.50, and that the same has been paid by said plaintiff in error.

I return, with the said transcript attached thereto, the original writ of error and the original citation filed in said cause.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court, at Portland, in said District ,this 17th day of July, 1923.

G. H. Marsh, Clerk. (Seal of the United States District Court, Oregon.)

Endorsed on cover: File No. 29,763. Oregon D. C. U. S. Term No. 453. Perry S. Olson and Ben S. Olson, partners, doing business under the firm name and style of Olson Bros. or Olson & Olson, plaintiffs in error, vs. United States Spruce Production Corporation. Filed July 25th, 1923. File No. 29,763.

No. 128

IN THE

Supreme Court of the United States

OCTOBER TERM, 1924

Perry S. Olson and Ben S. Olson, partners doing business under the firm name and style of Olson Bros., or Olson & Olson,
Plaintiffs in error,

vs.

United States Spruce Production Corporation, a corporation,
Defendant in error.

IN ERROR TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON.

BRIEF OF PLAINTIFFS IN ERROR

R. H. CAKE,
Yeon Building, Portland, Oregon
JOHN C. MURPHY,
O. A. NEAL,
F. R. SALWAY,
411 Chamber of Commerce Bldg., Portland, Oregon

Metropolitan Press, Portland, Oregon

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1924

Perry S. Olson and Ben S. Olson, partners doing business under the firm name and style of Olson Bros., or Olson & Olson,
Plaintiffs in error,
vs.
United States Spruce Production Corporation, a corporation,
Defendant in error.

IN ERROR TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON.

BRIEF OF PLAINTIFFS IN ERROR

STATEMENT OF FACTS

Olson Brothers, the plaintiffs in error, are co-partners, and on March 1, 1918, were carrying on logging operations upon Sections 11 and 2, Town-

ship 6, Range 10 W. of the W. M. in Clatsop County, Oregon and on March 1, 1918, there was located on said Section 11 approximately 12,000,000 feet of merchantable spruce and hemlock timber and on Section 2 approximately 8,000,000 feet, seventy-five to eighty per cent of which was hemlock.

That prior to March 1, 1918, plaintiffs in error had contracted to cut and deliver to Prouty Lumber and Box Co. all merchantable spruce and hemlock timber located on said two sections. That plaintiffs in error prior to March 1, 1918, for the purpose of removing said timber had furnished material and constructed railroad tracks for approximately one and one-half miles leading to the center of Section 11; had placed donkey engines, rollways and other equipment on to the center of Section 11 and had cut in to logs ready for transportation over said railroad approximately 5,000,000 feet of hemlock and spruce logs and had on the ground all necessary equipment for removing same in compliance with their said contract; had worked about one or two days hauling logs to the rollway and had expended on construction of said railroad and the placing of equipment on said land the sum of $18,000.00 and had expended the further sum of $6,750.00 in cutting said logs.

That on or about March 1, 1918, Brigadier-General Brice P. Disque, or Colonel Disque, as his title may have been at that time, then being in command of the spruce production division, caused to be sent

to the logging camp of the plaintiffs in error certain soldiers and officers of the army under his command, which officers notified the plaintiffs in error they could no longer cut and remove hemlock timber under their contract with the Prouty Lumber and Box Co. and that unless they confined their operations exclusively to the cutting of airplane spruce that their logging operations would be taken over by the Government and that they at the same time informed the plaintiffs in error that in going ahead and cutting airplane spruce exclusively they would be reimbursed by the Government.

The plaintiffs in error, acting on said promise of compensation for any losses suffered by them, thereafter devoted their entire time and energy and the use of their own money, employees and equipment to getting out airplane spruce logs exclusively from March 1, 1918, to the 12th of November, 1918, and between said dates the plaintiffs in error carried out all directions and instructions given them by officers acting under said General Disque, acting for the Division, and later acting as president and manager of the defendant in error, the United States Spruce Production Corporation after its organization, which was on August 19, 1918. That the plaintiffs in error during said time were directed to and did leave on the ground all merchantable hemlock timber and all merchantable spruce timber not considered fit for airplane stock and took up and removed at the request and under

the direction of defendant in error approximately 1200 feet of railroad tracks by them constructed and by direction of defendant in error constructed and placed rails on some 3000 feet of new railroad track, including two trestles leading on to said Section 2 at an additional cost to the plaintiffs in error of $6,500.00, for all of which expenditure the plaintiffs in error paid. That by tearing up said railroad and leaving all of said merchantable timber cut into logs on Section 11, the plaintiffs in error were thereby unable to remove said timber, all of which was lost to them. That the cost of construction of said railroad on to said Section 11 amounted to $18,000.00, the cost of cutting 5,000,000 feet of timber in to logs amounted to $6,750.00 and all profits which the plaintiffs in error would have made on 12,000,000 feet of merchantable timber in Section 11, if they could have continued to remove same, amounted to $48,000.00 was lost to the plaintiffs in error. That the plaintiffs in error were requested by the officers of said Division and later the officers, representing the corporation, to remove only number 1 and number 2 spruce, which required them to carry on what is known as selective logging, which required leaving on the ground large amounts of merchantable spruce timber and all of the merchantable hemlock timber.

That from March 1, 1918 to November 12, 1918, the plaintiffs in error carried on logging operations under the directions of officers representing the

Division, and later the United States Spruce Production Corporation and were able to get out two and one-half million feet, for which they received the sum of $7.50 per thousand from the Prouty Lumber and Box Co., or approximately $18,750.00. That the cost to the plaintiffs in error in labor and operation of said logging camp during said time, not including cost of removing railroad and equipment, was at least $5000.00 per month, by reason of which they were further damaged the sum of $21,-250.00.

That the plaintiffs in error were required to buy lumber, construct bunkers, shower baths and recreation hall for the soldiers employed in said camp, all at their own expense and which was a total loss to them and for which they received no compensation.

That the plaintiffs in error were required to cut logs in to lengths which cost 33 1-3 per cent more to cut.

That on March 1, 1918, the plaintiffs in error owned logging equipment of the approximate value of $32,000.00. On November 12, 1918, when they were notified to cease operations by the United States Spruce Production Corporation, the defendant in error, they had become indebted to the Prouty Lumber and Box Co. for moneys advanced to them to carry on said logging operations in the sum of $32,000.00 and in order to settle said indebted-

ness turned over all of their equipment aforesaid and thereby lost all the equipment and property held by them at the time said operations commenced on March 1, 1918.

That the plaintiffs in error by reason of said operations lost all profits which they would have made in removing all of said merchantable hemlock and spruce timber located on said lands not removed therefrom by reason of the defendant's direction, set forth in detail in complaint and amended complaint (shown on pages 2 to 14 inclusive, pages 22 to 27 inclusive of the trans. of record).

That on or about August 19, 1918, the defendant in error, the United States Spruce Production Corporation, was organized as a corporation under the laws of the State of Washington, under and pursuant to the act of Congress of July 9, 1918, (copy of which articles are shown on pages 10 to 14 of trans. of record) and thereafter complied with the foreign corporation laws of the State of Oregon, so as to entitled it to do business in the State of Oregon, and that said corporation took over and assumed control of and undertook the work theretofore carried on, or directed by the said Spruce Production Division and undertook to carry out all the agreements and promises and contracts theretofore made by the officers of the Spruce Production Division, acting by and through the same officers, and, thereupon continued to carry on and direct the said work and further promised the plaintiffs in er-

ror that they would be compensated therefor, and continued to carry on said operations as had been done prior thereto and thereby ratified and confirmed all that had been theretofore done or promised by said Spruce Division to and with the plaintiffs in error, and further promised the plaintiffs in error that they would be compensated therefor.

That on or about the 15th of November, 1918, after the Armistice, and after the plaintiffs in error had been notified by defendant in error to cease work and after defendant in error had ceased to operate or direct said operations of the logging camp of plaintiffs in error, the said defendant in error, acting by Brigadier-General Disque, it's president and manager, notified plaintiffs in error to send in their claim for damages.

The original complaint refers to the Dent Act, sets forth the circumstances of filing a claim with the Claim Board and of its disallowance, but as the plaintiffs in error claim nothing on account of the said act and as all reference to said act was eliminated from the amended complaint sought to be filed herein by the plaintiffs in error, we do not refer to said act as being of any importance here.

That no money was ever advanced or paid to plaintiffs in error by the defendant in error or by said Division, and subsequently plaintiffs in error commenced an action in the Circuit Court of the State of Oregon for the County of Multnomah

against defendant in error to recover damages resulting to them from the breach of contract of defendant in error to compensate them for damages suffered.

On petition of the defendant in error the case was removed to the District Court of the United States for the District of Oregon.

To this complaint the defendant in error filed a demurrer setting forth the following grounds: (Trans. p. 15)

> "That the complaint does not show any cause of action ever arose against defendant, or that this defendant is liable in any pretended cause of action, or that any cause of action now exists in favor of plaintiffs."

The District Court in passing upon said demurrer says:

> "The defendant challenges the sufficiency of the complaint on three grounds. In view of the conclusion reached it is necessary to advert to one of them."

The court then held as shown by its opinion. (Trans. p. 15 to 17 inclusive.)

That there was but one remedy and but one tribunal in which plaintiffs in error are entitled to seek relief, and that that tribunal was the Court of Claims.

Thereupon the court entered an order sustaining the demurrer and allowing plaintiffs ten days from January 2, 1923, to file an amended complaint, and on January 12, 1923, plaintiffs in error filed motion for rehearsing on demurrer. (Trans. p. 18 to 20 inclusive), which motion was overruled on March 26, 1923, (Trans. p. 21.)

On April 3, 1923, plaintiff filed motion for leave to file and tendered for filing an amended complaint eliminating any reference to the Dent Act. (Trans. p. 21 to 27 inclusive.)

On April 16, 1923, leave to file an amended complaint was denied. (Trans. p. 27.)

Thereupon, judgment dismissing action of plaintiffs in error allowing costs to defendant in error was entered.

Thereafter and during the same term and on the 14th of June, 1923, the court made the certificate requisite for certifying the question of jurisdiction to this court. (Trans. p. 31 and 32.)

The plaintiffs in error state that the judgement of dismissal is erroneous in the following respects:

Lord & Burnham Co. vs. Fleet Corp., 265 Fed. 955.

Bank-Russo-Asiatque of London vs. Fleet Corp., 266 Fed. 897.

Ingram Day Lumber Co. vs. Fleet Corp., 267 Fed. 283.

U. S. vs. Salas, 234 Fed. 842.

Panama R. R. Co. vs. Curran, 257 Fed. 768.

Ingersol Rand Co. vs. Fleet Corp., 187 N. Y. S. 695.

Eichberg vs. Fleet Corp., 273 Fed. 886.

In re Eastern Shore Shipbuilding Corp., 274 Fed. 893.

American Cotton Oil Co. vs. Fleet Cor., 270 Fed. 296.

U. S. vs. Strang, 254 U. S. 491; 65 L. Ed. 368.

Krichman vs. U. S. 254 U. S. 616-618; 65 L. Ed. 992-994.

The United States Spruce Production Corporation was organized under the laws of the State of Washington, which creates it a body politic and corporate with power to sue and be sued in any court of law or equity where it may transact business. This is a statement of a power which is incidental to every corporation.

Fletcher's Ency. on Corp., Vol. 4. Sec. 2925-2926.

Thompson on Corp. (2d Ed.) Vol. 3, Sec. 3145.

Thompson on Corp., (2d Ed.) Vol. 3, Sec. 2104.

Vol. 14-A, Corpus Juris, p. 785 and cases cited. 7 R. C. L. p. 689 Sec. 690.

Baltimore-Ohio R. R. Co. vs. Harris, 12 Wall. 65; 20 L. Ed. 354.

Sloan Shipyard Corp. vs. Fleet Corp., 258 S. C. R. 549-574, 66 L. Ed. 762, Ann. Cases 1913-c. p. 332.

The doctrine of government immunity has but little place in this country.

U. S. vs. Lee, 106 U. S. 196; 7 L. Ed. 171.

Gould Coupler Co. vs. U. S. Fleet Corp., 261 Fed. 716.

Fed. Sugar Ref. vs. U. S. Sugar Equalization Bd. 268 F. 585.

Exclusive ownership of stock by the United States does not make it immune from suit.

U. S. vs. Strang, 254 U. S. 491; 65 L. Ed. 368.

Salas vs. U. S. 148 C. C. A. 440; 234 Fed. 842.

Panama R. R. Co. vs. Curran, 168 C. C. A. 114; 256 F. 772.

Bank of U. S. vs. Planters' Bank, 9 Wheat. 904; 6 L. Ed. 244.

Bank of Ky. vs. Wister, 2 Pet. 318; 7 L. Ed. 437.

Brisco vs. Bank of Ky., 11 Pet. 257; 9 L. Ed. 709.

The creation by Congress of a corporation to facilitate of the discharge of a governmental function does not in itself imply immunity from suit.

Osborn vs. Bank of U. S. 9 Wheat. 738; 6 L. Ed. 204.

McCulloch vs. Md., 4 Wheat. 315; 4 L. Ed. 579.

Farmers' Bank & M. Bank vs. Dearing, 91 U. S. 29; 23 L. Ed. 196.

Thompson vs. Union P. R. Co., 9 Wall. 579; 19 L. Ed. 792.

Davis vs. Elmira Savings Bank, 161 U. S. 275; 40 L. Ed. 700.

U. S. vs. Union Pac. R. Co., 98 U. S. 569; 25 L. Ed. 143.

Luxton vs North River Bridge Co., 156 U. S. 525; 38 L. Ed. 808.

ARGUMENT

The question of jurisdiction raised in this case makes it necessary to examine the statutes under which the United States Spruce Production Corporation came into existence.

The Act of Congress (of July 9, 1918, Chapter 143, Subdivision 16, Sec. 1, 40 Statutes 888-9, Sec. 3115 1/32 G, U. S. Compiled Statutes 1918, Compact Ed. p. 1771) among other things provides:

> "The Director of Aircraft Production may, whenever in his judgment it will facilitate and expedite the production of aircraft, aircraft equipment, or materials therefor, for the United States and governments allied with it in the prosecution of the present war, form under the laws of the District of Columbia, or under the laws of any state, one or more corporations for the purchase, production, manufacture and sale of aircraft, aircraft equipment, or materials therefor, and to build, own, and operate railroads in connection therewith. The total capital stock so formed, together with any bonds, notes, debentures, or other securities issued by them, shall not at any one time exceed $100,000,000.00."

The Act (Sec. 2) provides:

"The Director of Aircraft Production may, for and on behalf of the United States, subscribe, purchase, and vote not less than a majority of the voting capital stock of any such corporation, and may purchase for and on behalf of the United States all or any part of the preferred non-voting stock, bonds, notes, debentures, or other securities issued by such corporations, and do all things necessary to protect the interest of the United States and to carry out the purpose of this chapter; and, with the approval of the Secretary of War, may sell any or all of the stock, bonds, notes, debentures, or other securities of the United States in such corporation: Provided, That at no time shall the United States be a minority holder of voting stock therein. Any sums heretofore or hereafter appropriated for the purchase or procurement of aircraft, aircraft equipment, or materials therefor, for the Army shall be available for the purchase of the capital stock of such corporation or corporations or their bonds, notes, debentures, or other securities."

The Act (Sec. 3) authorizes the dissolution of the corporation within one year from signing of treaty of peace with the Imperial German Government and for distribution of its assets in accordance with the laws of the state where organized.

The Act (Sec. 4) among other things authorizes the Secretary of War to assign enlisted men, or commissioned officers in the military organization, as deemed necessary, or desirable, to carry on the work of the corporation or corporations: Provided, that nothing in the Act should prevent such corporation or corporations from employing civilians in the manner customary in the conduct of ordinary business under corporate organization.

The Act (Sec. 5) authorized the Secretary of War, acting through the Director of Aircraft Production, to transfer to such corporation any interest of the United States in any existing contracts for aircraft, aircraft equipment, or materials therefor, etc., on such terms as the Secretary of War, acting through Director of Aircraft Production, deemed fit.

Under and pursuant to said Act of Congress of July 9, 1918, there was caused to be organized under the laws of the State of Washington by John E. Morely, Prescott W. Cookingham and John P. Murphy, the United States Spruce Production Corporation, the defendant in error.

The charter of this corporation consists of said Act of Congress of July 9, 1918, authorizing the Aircraft Board to organize such corporation.

The laws of the State of Washington under

which it was organized and the certificate of incorporation issued under and pursuant to the laws of the State of Washington.

The Laws of the State of Washington in so far as applicable here provide:

Sec. 3677 Rem.-Bal. Code in part provides:

> "Corporations for manufacturing, mining, milling, wharfing, and docking, mechanical, banking, mercantile, improvement and building purposes, or for the building, equipping and managing water flumes for the transportation of wood and lumber, or for the purpose of building, equipping and running railroads, or constructing canals or irrigation canals, or engaging in any other species of trade or business, may be formed according to the provisions of this chapter; such corporations and the members thereof being subject to all the conditions and liabilities herein imposed, and to none others."

Sec. 3679 Rem.-Bal. Code in part provides:

> "Any two or more persons, who may desire to form a company for one or more of the purposes specified in Sec. 3677 (Rem. Bal.), shall make and subscribe written articles of incorporation in triplicate, and acknowledge the same before any officer authorized to take the

acknowledgement of deeds, and file one of such articles in the office of the Secretary of State, and another in the office of the county auditor of the county in which the principal place of business of the company is intended to be located, and retain the third in the possession of the corporation. Said articles shall state the corporate name of the company, the objects for which the same shall be formed, the amount of its capital stock, the time of its existence, not to exceed fifty years."

Sec. 3680 Rem.-Bal. Code in part provides:

"Private corporations may be formed in the manner prescribed by the laws of this state governing corporations for any purpose for which individuals may lawfully associate."

Sec. 3683 Rem.-Bal. Code in part provides:

"When the certificate shall have been filed, the persons who shall have signed, and acknowledged the same, and their successors, shall be a body corporate and politic in fact and in name, by the name stated in their certificate, and by their corporate name have succession for the period limited, and shall have power.

To sue and be sued in any court having competent jurisdiction. To appoint such officers,

agents, and servants as the business of the corporation shall require: to define their powers, prescribe their duties, and for their compensation. The management of its property, the regulation of its affairs, the transfer of its stock, and for carrying on all kinds of business within the objects and purposes of the company, as expressed in the articles of incorporation."

After the Armistice was signed and on March 2, 1919, Congress passed an act known as the "Dent Act," which, among other things, provided:

"That the Secretary of War be, and he is hereby, authorized to adjust, pay, or discharge any agreement, express or implied, upon a fair and equitable basis that has been entered into, in good faith during the present emergency and prior to November twelfth, nineteen hundred and eighteen, by any officer or agent acting under his authority, direction, or instruction, or that of the President, with any person, firm, or corporation for the acquisition of lands, or the use thereof, or for damages resulting from notice by the Government of its intention to acquire or use said lands, or for the production, manufacture, sale, acquisition or control of equipment, materials or supplies, or for services or for facilities, or other purposes connected with the prosecution of the

war, when such agreement has been performed in whole or in part, or expenditures have been made or obligations incurred upon the faith of the same by any such person, firm, or corporation prior to November twelfth, nineteen hundred and eighteen, and such agreement has not been executed in the manner prescribed by law: Provided, That in no case shall any award either by the Secretary of War, or the Court of Claims include prospective or possible profits on any part of the contract beyond the goods and supplies delivered to and accepted by the United States and a reasonable remuneration for expenditures and obligations or liabilities necessarily incurred in performing or preparing to perform said contract or order: Provided, further, That this Act shall not authorize payment to be made of any claim not presented before June thirtieth, nineteen hundred and nineteen."

(March 2, 1919, Chap. 94, Sec. 1, 40 Stat. 1272.)

"The Court of Claims is hereby given jurisdiction on petition of any individual, firm, company, or corporation referred to in Section 1 hereof, to find and award fair and just compensation in the cases specified in said Section in the event that such individual, firm, company, or corporation shall not be willing to accept the adjustment, payment or compensa-

tion offered by the Secretary of War as hereinbefore provided, or in the event that the Secretary of War shall fail or refuse to offer a satisfactory adjustment, payment or compensation as provided for in said Section."

(March 2, 1919, Chap. 94, Sec. 2, 40 Stat. 1273.)

It is our contention that when Congress by said Act of July 9, 1918, provided that the corporation should be organized under the laws of the District of Columbia, or under the laws of any State, and the corporation was organized under the laws of the State of Washington, that it was the equivalent of Congress having written into said act all the provisions of the laws of the State of Washington governing the organization and conduct of private corporations and Congress could not but have understood it was authorized to be formed a private corporation that could sue and be sued in the State or Federal courts, as the ordinary questions of jurisdiction might control. Otherwise it certainly would have made other provisions. And when Congress thus adopted the laws of the State of Washington regulating the organization of private corporations, it expressly authorized the corporation formed to sue and be sued.

The articles of incorporation filed (a copy of which is shown the transcript of record p. 10 to 14 inclusive) show that the defendant in error is

purely a private business corporation authorized to engage in many and varied enterprises.

The Act of Congress of July 9, 1918, above referred to, contemplated that private individuals might become stockholders in said corporation, the only restriction being that the United States should at no time be a minority stockholder.

It is true that the complaint in this action (par. XVII, Trans. of Record p. 9) alleges that plaintiffs in error presented their claim for damages to the Secretary of War, or to the Claim Board of the Spruce Production Corporation, and that it was by the Claim Board denied. However, this can have no effect upon the question here involved, or the merits of the controversy. The presentation of the said claim to the said Claim Board was made under a misapprehension of the rights of plaintiffs in error, they being under no obligation whatever to make any such presentation.

It is our contention that the "Dent Act" has no application to this case whatever, and we endeavored to eliminate it from the case in the lower court by tendering for filing an amended complaint eliminating all reference thereto.

It is our contention that the "Dent Act" was passed for the purpose of adjusting claims against the United States Government and for no other purpose, and this is clearly shown by the act, for it provides for taking a case into the Court of

Claims if claimant is not satisfied with the ruling of the Secretary of War, but as no claims can be litigated in the Court of Claims, except those against the United States Government, it therefore, would seem clear that the claim of the plaintiffs in error against the United States Spruce Production Corporation, a private corporation, organized under the laws of the State of Washington, could not under any circumstances be sued in the Court of Claims, unless it be contended that an action against the defendant in error is in effect an action against the United States Government, but the plaintiffs are not sueing the United States, but the United States Spruce Production Corporation, and the action is based upon the promise of the corporation, acting by and through its officers and agents, to compensate plaintiffs in error for such damages as plaintiffs in error suffered from carrying out the orders and requests of said defendant in error, after it took over all of the rights of and assumed all the obligations incurred by the Spruce Production Division, a large part of which damage accrued after the said defendant in error took over the work theretofore directed by the Spruce Production Division, though the complaint does not definitely fix the amount of damages accruing prior to the taking over of the operations of the plaintiffs logging camp by the defendant corporation, but that is immaterial here.

The defendant in error, as shown by the com-

plaint herein, ceased control of the operations of the logging camp of the plaintiffs in error on November 12, 1918, when it notified plaintiffs in error to close down their camp and send in to it their claim for damages. That the said corporation was then liable to the plaintiffs in error upon its promise of compensation for such damages as plaintiffs in error might suffer by reason of their carrying out the requests and directions of said corporation and the right of the plaintiffs in error to then commence action against said defendant in error in the courts, state or federal, upon said contract or agreement to compensate them, became absolute and this right of action could not be taken away by the "Dent Act" or by any other act of Congress. It had then become a vested right. (Pritchard vs. Norton, 106 U. S. 124, 27 L. Ed. 107.)

After the defendant in error promised and agreed to compensate plaintiffs in error and plaintiffs in error went ahead and carried out its orders and directions using their own money at all times and were damaged thereby, even if plaintiffs in error might have sued the United States Government for part of their damages, they were not cut off from the remedy which the law gave them against the corporation upon its promise to compensate them. Of course, how much damage was caused after the corporation took over and directed the work or the operations of the logging camp and

equipment of the plaintiffs in error and how much before is wholly immaterial here, as the only question for decision is whether the United States District Court for the District of Oregon had jurisdiction to hear and determine this cause upon its merits, or whether as held by the lower court, plaintiffs in error had but one remedy and but one tribunal in which they are entitled to seek relief and that tribunal, the Court of Claims.

It is our contention that Congress did not attempt to, and that if it had, that it had no authority to pass any act which directly or by implication would nullify the laws of the State of Washington authorizing the formation of corporations or to set aside or nullify that portion of the corporation laws of said state which authorized a corporation organized thereunder to sue and be sued.

The United States Spruce Production Corporation is not the only agency used by the Government during the war. The Fleet Corporation was extensively used, the railroads were taken over and the books are full of inumerable cases brought against the Director-General in both state and Federal courts. The status of the United States Sugar Equalization Board was passed on in U. S. Sugar Refining Corporation against U. S. Sugar Equalization Board, 268 Fed. 575.

The court said:

"If the sovereign does choose as the agent a state corporation which can be sued, it cannot by ipse dixit deprive one injured by such an agent of the right to sue. The State of Delaware allowed the defendant to be created, but as a condition of its creation and existence it afforded the right to anyone to sue the corporate being which it created. It is alleged that upon the direction of the President, defendant was incorporated. This is but another way of saying that the president directed that the necessary number of persons required under the Delaware Statute should take the steps necessary under that statute to incorporate a defendant subject to the liability of that statute. Neither the executive, nor any person acting with authority under him had the power to change the Delaware Statute, and hence no power to change the obligations, rights, or liabilities of a corporation which was the creature of the sovereign, State of Delaware."

THE POWER TO SUE AND BE SUED IS AN ESSENTIAL ELEMENT OF CORPORATE EXISTENCE. The laws of the State of Washington provide that this corporation may sue and be sued but even though these laws did not contain an express declaration to that effect the corporation would nevertheless be suable for the power to sue and be sued is an essential element of corporate existence.

In order to defeat the jurisdiction of the District Court in this case, it would be necessary to invoke the rule of governmental immunity which at best has little or no place in our system of government. In this country we have no personal sovereign clothed with royal purple of sovereignty. The rule that the sovereign is immune from suit is but a remnant of the autocratic theory of the feudal ages, that the king can do not wrong. The origin of this rule and its place in our system of government was exhaustively considered by Mr. Justice Miller in the celebrated case of United States vs. Lee, 106 U. S. 196, 27 L. Ed. 171. This was an action brought in the courts of Virginia by the heirs of Mrs. Robert E. Lee to recover possession of the Arlington estate seized by federal authorities during the Civil War. The action was in form ejectment against certain individuals claiming to hold possession as agents of the United States. The attorney general appeared objecting to the jurisdiction and claiming the action to be in effect one against the United States. Mr. Justice Miller in deciding said case said:

> "What were the reasons which forbade that the King should be sued in his own court, and how do these reasons apply to the political body corporate which we call the United States of America? As regards the King, one reason given by the old judges was the absurdity of the King's sending a writ to himself to

command the King to appear in the King's court. No such reason exists in our government, as process runs in the name of the President and may be served on the attorney general * * * nor can it be said that the dignity of the government is degraded by appearing as a defendant in the courts of its own creation, because it is constantly appearing as a party in such courts and submitting its rights as against the citizens to their judgment * * *. As we have no person in this government who exercises supreme executive power or performs public duties of a sovereign, it is difficult to say on what solid foundation of principle the exemption from liability to suit rests. It seems most probable that it has been adopted in our courts as part of the general doctrine of publicists, that the supreme power in every state, wherever it may reside, shall not be compelled by process of courts of its own creation to defend itself from assaults in those courts. * * * Notwithstanding the progress which has been made (in England) since the days of the Stuarts in stripping the crown of its powers and prerogatives, it remains true today that the monarch is looked upon with too much reverence to be subjected to the demands of the law, as ordinary persons are, and the King-loving nation would be shocked at the spectacle of their Queen being turned out of her pleasure garden by a writ of ejectment against

the gardener. The Crown remains a fountain of honor, and the surroundings which give dignity and majesty to the possessor are cherished and enforced all the more strictly because of the loss of real power in the government. * * * Under our system the people, who are here called subjects, are the sovereign. The rights, whether collective or individual, are not bound to give way to a sentiment of loyalty to the person of a monarch. The citizen here knows no person however near to whom he need yield the rights which the law secures to him when it is well administered. When he, in one of the courts of competent jurisdiction, has established his right to property, there is no reason why deference to any person, natural or artificial, not even the United States, should prevent him from using the means which the law gives to him for the protection and enforcement of that right."

Without quoting further from this opinion it suffices to say that the majority of the Court as then constituted, speaking through Mr. Justice Miller, forcibly and even vehemently repel the idea that an agent of the government can grievously wrong the citizen and then hide behind the worn-out rule of governmental immunity. While compeled to recognize the existence of the rule as a matter of precedent, the Court nevertheless held that the exemption is limited to suits against the

United States directly and by name, and cannot be successfully pleaded in favor of officers and agents of the United States when sued by private persons for property in their possession as such officers and agents. The thought so forcibly expressed by Mr. Justice Miller in the Lee case was referred to as the just and proper rule by Judge Hand in the Gould-Coupler case, 261 Fed. 716, and by Judge Mayer in the Sugar Equalization Board case, 268 Fed. 585. It may be said that there are other decisions of this court which indicate that the doctrine of governmental immunity has not been construed and applied as strictly as Mr. Justice Miller said should be the practice. That, however, is entirely beside the present question. It must be presumed that Congress, when it determined to authorize the creation of the United States Spruce Production Corporation to engage in the production and operation of aircraft, aircraft equipment and materials therefore and generally in the transaction of a commercial business knew that the doctrine of governmental immunity was without any real foundation in our system of government although as a matter of precedent recognized by the Courts. Congress therefore carefully provided that this corporation should be so formed that it would not be as an engine of injustice to the citizen. The attributes of a personal sovereign were expressly denied to it.

Here it is well to ask why did Congress expressly

declare that this corporation should have power to sue and be sued? Did Congress act intelligently and with an honest purpose or did it act without intelligence and with dishonest motive? If Congress was acting both intelligently and honestly why did it provide that this corporation could sue and be sued if it really meant that it could sue but could not have suits brought against it. If it was the intention to make this corporation immune Congress could not have acted more unintelligently or crudely than by requiring its formation under the Laws of the District of Columbia or one of the States, in this case the State of Washington.

As before shown the laws of the State of Washington expressly provide that this corporation may sue and be sued and even though these laws did not contain an express declaration to that effect, the corporation would necessarily be suable for the power to sue and be sued is an essential element of corporate existence.

Abundant authority is found in the decisions of the Courts and without discussing them at length we quote from B. & O. R. R. vs. Harris 12 Wall., 65, 20 L. Ed. 354, as follows:

> "A corporation is in law for civil purposes deemed a person. It may sue and be sued, grant and receive and do all other acts not ultra vires which a natural person could do. The chief point of difference between the nat-

> ural and artificial person is that the former may do whatever is not forbidden by law; the latter can do only what is authorized by its charter. It cannot migrate but may exercise its authority in a foreign territory upon such conditions as may be prescribed by law of the place. One of these conditions may be that it shall consent to be sued there. If it do business there it will be presumed to have assented and will be bound accordingly."

To say that it was not the purpose to give this corporation power to sue and be sued is to say that Congress and the aircraft board intended to bring into existence not a real corporation but only the outward form or appearance; in other words a mere corporate shell. The power to sue cannot be divorced from the power to be sued, the one power is a correlative of the other. If the power to be sued is denied, likewise the power to bring suits must also be denied.

The defendant corporation was organized and all of the transactions under which it became obligated to the plaintiffs took place prior to November 12, 1918, and the right of plaintiffs to maintain this action then became vested.

As said by the Supreme Court of the United States in the case of Pritchard vs. Norton, 106 U. S. 124, 27 L. Ed. at 107,

> "A vested right of action is property in the same sense in which tangible things are property, and is equally protected against arbitrary interference. Whether it springs from contract or from the principles of the common law, it is not competent for the legislature to take it away."

There was then no act of Congress under which it is even claimed that such right to sue could or has been taken away. The Act of Congress known as the "Dent Act" was not passed until March 2, 1919, long after the cause of action had accrued and there is nothing in the "Dent Act" by which Congress undertook to expressly take away from individuals or corporations the right which it had granted to them to maintain suits against the United States Spruce Production Corporation in either the State or Federal Courts and we submit that the intention of Congress to force claimants having claims against the United States Spruce Production Corporation to go into the Court of Claims cannot be implied from anything stated in the Act. Furthermore, it is our contention that there is nothing in the "Dent Act" showing any intention on the part of Congress to provide a remedy in the Court of Claims to litigants who might then have had claims against the United States Spruce Production Corporation, the intention of the said Act being only to provide a remedy for claimants having claims where it was necessary to sue the United States Government itself.

The creation by Congress of a corporation to facilitate the discharge of a governmental function does not in itself imply immunity from suit. The main insistence of the defendant is that the defendant corporation was formed as a facility for the discharge of a governmental function and is therefore necessarily immune from suit, although Congress, in the exercise of its own proper powers saw fit to require it to be formed under the laws of the District of Columbia or one of the States and as to this particular defendant under the State of Washington, which expressly provide that it may sue and be sued. Otherwise stated the defendant's contention amounts to this: That every corporation authorized to be formed by Congress, is, of necessity, immune from suit and Congress is without power to otherwise provide. The premise of the defendant that the defendant corporation was formed to discharge a governmental function can well be admitted but the conclusion that it is therefore immune from suit by no means follows. This contention calls for a consideration of the source from whence Congress derives its power to create corporations. The Federal Constitution does not in terms confer that power upon Congress. In the early history of the government the power of Congress to create corporations was for a long time denied because no express authority to that end was included in the Constitution. The case finally came before the Supreme Court in McCulloch vs. Maryland, 4 Wheat. 315, in which the

doctrine of implied powers was expounded. The case involved the validity of an act of Maryland which undertook to tax the operations of the Baltimore branch of the old bank of the United States. Two principal questions were involved and discussed:

FIRST. Does the Federal Government possess power to create a corporation?

SECOND. If the Federal Government has the power to create a banking corporation is such a corporation free from State taxation?

Chief Justice Marshall wrote the opinion and held that while there is no express power delegated to the federal government by the Constitution to create a corporation, yet the creation of a banking corporation is a convenient and necessary means for effectuating the purposes of the Federal Government and from this it followed that the power to create a corporation is necessarily implied there being no prohibition in the constitution as to the means which Congress might employ to discharge the governmental functions. The Court among other things said:

> "Among the enumerated powers, we do not find that of establishing a bank or creating a corporation but there is no phrase in the instrument which like the articles of Confederation excludes incidental or implied powers; and

which requires that everything granted shall be expressly and minutely described. * * * If a corporation may be employed indiscriminately with other means to carry into execution the powers of the Government no particular reason can be assigned for excluding the use of a bank, if required, for its fiscal operations. To use one must be within the discretion of Congress if it be an appropriate mode of executing the powers of government."

At another place the court said:

"Although among the enumerated powers of government we do not find the word "bank" or "incorporation" we find the great powers to lay and collect taxes; to borrow money, to regulate commerce, to declare and conduct a war and to raise and support armies and navies."

The Court concluded that Congress has implied power to create a corporation as a convenient or necessary means of discharging what are designated as the great enumerated powers and the creation of a banking corporation was approved on the theory that a banking corporation so created is an instrumentality of the Treasury Department. The same conclusion was reiterated in the case of Osborne vs. Bank, 9 Wheat. 708. The corporation involved in the McCuloch and Osborne cases was the old bank of the United States created by special charter. However, the existence of national

banks under the present National Bank Act rests upon the same principle of constitutional law. Bank vs. Deering, 91 U. S. 29.

In an unbroken line of authority subsequent to McCulloch vs. Maryland this court has repeatedly stated that a National Bank is an instrumentality of the Federal Government.

In the case of Davis vs. Elmira Savings Bank, 161 U. S. 275, Chief Justice White said:

> "The national banks are instrumentalities of the Federal Government created for a public purpose and as such necessarily subject to the paramount authority of the United States. * * * These principles are axiomatic and are sanctioned by the repeated adjudications of this court."

Hence, it is plain that the only authority Congress has to create any corporation arises from the implied power to use all convenient means for exercising one or the other of the great enumerated powers such as to lay and collect taxes; borrow money, regulate commerce or declare and conduct war.

In the course of time Congress as a means of facilitating commerce and providing for the national defense found it necessary to confer corporate powers and privileges on several of the transcontinental railroad companies. The Union

Pacific Railway Company was created by Congress as an instrumentality of interestate commerce and national defense and on this ground direct financial aid was extended to it by the national government.

> Thomson vs. Union Pacific R. R. Co. 9 Wall 759, 19 L. Ed. 792,
>
> Union Pacific R. R. Co. vs. Pemiston, 18 Wall 5, 21 L. Ed. 787,
>
> United States vs. Union Pacific Railroad Co. 8 Otto 569, 25 L. Ed. 143,
>
> United States vs. Union Pacific R. R. Co. 9 Otto 700, 25 L. Ed. 496.

In Luxton vs. North River Bridge Co. 153 U. S. 529, 38 L. Ed. 808, the Supreme Court sustained the validity of a federal corporation created by Congress to build an interstate bridge as a proper exercise of an implied power incidental to the delegated power to regulate commerce. In that case the Court said:

> "The Congress of the United States being empowered by the Constitution to regulate commerce among the several states, and to pass all laws necessary or proper for carrying into execution any of the powers specifically conferred may make use of any appropriate means for this end. As said by Chief Justice Marshall, 'The power of creating a corporation

> though appertaining to sovereignty is not like the power of making war or levying taxes or of regulating commerce, a great substantive and independent power which cannot be implied as incidental to other powers or used as a means of executing them. It is never the end for which other powers are exercised, but a means by which other objects are accomplished'. Congress therefore may create corporations as appropriate means of executing the powers of government as for instance, a bank for the purpose of carrying on the fiscal operations of the United States or a railroad corporation for the purpose f promoting commerce among the states. Congress has likewise the power exercised early in the century by successive acts in the case of the Cumberland or National Road from the Potomac across the Alleghenies to the Ohio, to authorize the construction of a public highway connecting several states."

It will thus be seen that the only power Congress has to create any corporation at all is an implied power to do those things necessary or convenient to carry into effect one or the other of the great powers enumerated in the constitution. To say, therefore, that the defendant corporation is an arm of the government is only to assert that it is a facility or instrumentality just as a national bank, an interstate railroad or an interstate bridge

company is an instrumentality of the government. If mere Federal incorporation for a governmental purpose of itself implies immunity from suit, national banks, federal railroad corporations and federal interstate bridge companies would possess that immunity equally with the defendant corporation. Up to this time no Court has ever decided that a National Bank or Federal railroad or interstate bridge company is immune from suit merely because it owes its existence to an act of Congress. The authority of Congress to confer corporate powers on railroad companies is implied as incidental to the war power in conjunction with the power to regulate commerce. The implied power to create the defendant corporation is plainly referable to the same enumerated powers.

When Congress saw the necessity of creating this corporation it could have provided therefore in either of three ways:

First, by creating the corporation by special charter as was done in the case of the old bank of the United States, but this method was not adopted.

Second, by passing a general incorporation act like the present national bank act, but Congress saw fit not to adopt this method.

Third, by providing for incorporation under the existing laws of the District of Columbia or any of the States, the laws of the District of Columbia,

of course, being Federal and those of the States purely State laws. This method was adopted and Congress must have intended to incorporate into the charter the provisions of the act of the various States under which it authorized such corporations to be organized.

To impute to Congress an intent to make this corporation capable of entering into contracts, capable of enforcing such contracts by suit, but at the same time incapable of responding when sued on those very same contracts, is to impute to Congress a purpose to perpetrate the most flagrant dishonesty. If Congress had expressly said the United States Spruce Production Corporation shall be formed; it shall have the power to engage generally in business; it shall have power to make contracts; it shall have power to sue on those contracts, but it cannot be made to respond when it breaches its contracts, of course, no person would have entered into business relations with it. Thus the very purpose for which the corporation was formed would have been frustrated. Hence, we must assume, that Congress did not expressly confer immunity from suit, because it knew that such a provision would entirely destroy the efficacy of this corporation as a means to the desired end. For the Courts to now hold, that this immunity may vaguely be implied where Congress refrained from granting it expressly is equivalent to saying

that Congress intended to create a trap for the unwary.

If, as it seems to be contended, every corporation created by Congress for the discharge of governmental functions is thereby necessarily immune from suit, and Congress is without power to otherwise provide, it seems strange that this most important doctrine has been so long dormant. Practically since the beginning of the government, Congress has been forming these corporations for one purpose or another, the power to do so being referable to one or the other of the great powers enumerated in the Constitution. The reports are full of cases of all kinds in which these corporations have been sued and not infrequently by the government itself. If, as the defendant now contends, corporations of this class are necessarily immune, it seems incredible that some Court has not so declared long before this.

It is true the National Bank act expressly provides, that national banks may sue and be sued, but with equal emphasis the incorporation laws of the State of Washington declare, that the defendant corporation may sue and be sued. The express provision of the one statute is neither more nor less emphatic than the corresponding provision of the other.

The case of Ballaine vs. Alaska Northern Railway Co., 259 Fed. 183, is the only reported case, we be-

lieve, holding that a corporation created by Congress or in which the United States is the controlling stockholder is immune from suit; this decision, we submit, is either wrong in principle or it turns on facts peculiar to itself and entirely dissimilar from those of the case at bar. For a clear understanding of the facts, reference should be made to the report as contained in 5 Alaska Reports 694, as well as that of the Circuit Court of Appeals, 259 Fed. 183.

On March 12, 1914, Congress passed an act authorizing the President to locate, construct and operate railways in Alaska.

On April 6, 1915, the Secretary of the Interior, acting for the President, entered into an agreement with certain officers and agents of the Alaska Northern Railway Co. whereby the United States acquired all the stocks, bonds and assets of that corporation, except certain claims of the raliway company against third parties relating to the townsite of Seward. Ballaine and his brother were evidently among the persons against whom these supposed claims existed. These claims were expressly excluded from the purchase made on behalf of the United States.

On April 29, 1915, the prior owners of the Alaska Northern Railway Co., using the corporation as a nominal plaintiff, brought action against Ballaine

to establish the rights in the Seward townsite reserved in the contract of sale to the United States. On September 21, 1915, before the trial of the action, the Secretary of the Interior in response to an inquiry from Ballaine advised him that the United States were in no way interested in the litigation but that the rights to the proceeds of the litigation had been expressly reserved to the Canadian Bondholders who made the sale to the United States. On November 1, 1915, the case was tried in the Alaska Court and resulted favorably to Ballaine who was personally present at the trial and knew all the facts relative to the transaction. On June 24, 1916, Ballaine brought an action against the Alaska Northern Railway Company to recover damages in the sum of $150,000.00 on the ground that the townsite litigation was instituted maliciously and without probable cause. On October 23, 1916, the United States, by leave of Court, intervened in the damage action setting up the terms and conditions of the sale, that the townsite litigation had been prosecuted wholly in behalf of the former owners, that the United States had been paid in full for the stocks, bonds and railway assets, and that the road was then held and controlled in behalf of the United States. Ballaine demurred to the intervening complaint and the demurrer was overruled (5 Alaska Reports 694). Apparently, then Ballaine answered setting up some affirmative matters whereupon the United States demurred to Ballaine's answer (259 Fed. 183) and

that demurrer was sustained and the action di
missed.

The particular case before the Court was tha
of Frank L. Ballaine for $150,000, but from repo
of the case as stated by District Judge Brown
Alaska it appears that John E. Ballaine brought
companion suit upon the same ground for $300,00
The dismissal of the action was ordered by th
trial court and sustained by the Circuit Court
Appeals on the theory that the action against th
Railway Company was one sounding in tort; tha
the real party defending was the United States an
that therefore there was no jurisdiction to pro
ceed.

The first thing that strikes the reader is tha
the claims of the Ballaines for $450,000 damage
for the mere prosecution of an ordinary civil sui
in which on the trial they prevailed are so fanci
ful that any court would strain a point to termin
ate the action quickly, when it seems to have beer
a matter of common knowledge, as indicated by
District Judge Brown in his opinion, that the land
in question was of little or no value until the United
States had acquired the railway property. It is
not improbable that unconsciously or otherwise,
this was the real consideration that brought about
or influenced the dismissal of the action. (See later
suits against bondholders in which after trial on
merits Court of Appeals held Ballaine had sustained

no recoverable damage. Bolland vs. Ballaine, 266 Fed. 22.) The ground upon which the dismissal was placed, however, was that the action, in effect was one to obtain a judgment and satisfy that judgment out of property which had passed to the United States in its sovereign capacity. The issue seems to have been presented to the Circuit Court of appeals upon these opposing contentions as to the facts relative to the operation of the Alaska Northern Railway Company after the United States had secured control. Ballaine contended that the railway property had been acquired by the United States as a purely commercial venture. On the other hand the United States contended that the property had been acquired solely for governmental and public uses. It apparently was assumed by the Court and counsel that if the latter view was correct as to the fact the dismissal was properly ordered. Adopting the view of the facts contended for by the government the Circuit Court of Appeals sustained the dismissal.

We think we have clearly shown, in a preceding portion of this brief, that the mere incorporation of a railway company by Congress for governmental and public uses does not imply immunity from suit. The very cases cited by the Circuit Court of Appeals to sustain the constitutional power of Congress to construct or acquire railroads for public purposes suggest, if they do not hold, that such corporation when brought into ex-

istence are suable. For instance, the Circuit Cour of Appeals cites the case of California vs. Centra Pacific Railway Company, 127 U. S. 1, 32 L. Ed 150. By reference to that decision it will be see that that was an action in which the State of Cali fornia sued the Central Pacific Railway Co., a fed eral corporation. If that corporation being formed for a federal purpose was not suable at all, hov does it happen that the case ever reached a decisio on the merits?

Two other cases cited by the Circuit Court o Appeals and upon which it bases its decisions namely, Murray vs. Wilson Distilling Co., 213 U. S 151 and 53 L. Ed. 743; and Cunningham vs. Macon and New Brunswick R. R. Co., 141 U. S. 446; 2 L. Ed. 992, plainly are not in point at all, fo neither of those decision have any relation what ever to the question whether a corporation created by Congress or in which the United States has the controlling ownership is suable or immune from suit.

The Murray Case was simply an action brought against certain state officials of the State of South Carolina in their official capacity to control a fund which the court found to be, in fact, the money of the State of South Carolina in its sovereign capacity. Of course this was a suit against the State and not within the cognizance of the Federal Courts by reason of the prohibition of the 11th Amendment.

The Cunningham Case was an action brought to foreclose a mortgage on railroad property. The legal title and actual possession was vested in the State of Georgia directly and not indirectly through a corporation in which it held stock. The Court held that under these circumstances, the State being an indispensable party, a Federal Court could not exercise jurisdiction because of the prohibition of the 11th Amendment.

We think it quite plain that the decision of the Circuit Court of Appeals of the Ninth Circuit in the Ballaine case is not sustained by the decisions cited by that Court, nor can it be sustained by any decisions that can be produced. Moreover, the Court dismissed the action because it assumed in advance that the plaintiff if he obtained judgment would undertake to levy execution against certain property which could not be subjected to the judgment because of the interest of the United States in that property. We think this was not a good reason for dismissing the suit. What steps the plaintiff might take to satisfy a judgment if he got one could not be known, as a matter of law until after the judgment had been rendered. If then, the plaintiff should attempt to wrongfully levy execution on property not subject to execution, that would seem to be time enough for the United States to raise the question. The fact that there might be no property subject to execution to satisfy the judgment was not a sufficient reason for the court

refusing to permit a trial on the merits if otherwise the plaintiff was entitled to such a trial.

The Ballaine case is not in harmony with prior cases. Since its rendition it has been cited several times to Federal judges and with the exception of the District Judges of the Ninth Circuit, no judge has followed it.

Judge Dickensen (261 Fed. 443) and Judge Call (269 Fed. 320) find the Ballaine case in conflict with Salas vs. U. S. 234 Fed. 842, and follow the latter.

Judge Ervin (266 Fed. 751) and Judge Holmes (267 Fed. 293) cite the Ballaine case but follow the contrary decisions of Judge Dickenson and Hand.

Judge Mayer (268 Fed. 585) says that if the Ballaine decision is to be deemed an authority at all it must be on the special facts of the case and declines to follow it.

And the said case is now clearly in conflict with the decision of this court in case of Sloan Shipyards Corp. vs. United States Shipping Board E. M. F. Corp., 258 U. S. 549, 574, 66 L. Ed. 762, where the court after referring to the various provisions of law under which the corporation was organized say:

"These provisions sufficiently indicate the enormous powers ultimately given to the Fleet Corporation. They have suggested the argument that it was so far put in the place of the sovereign as to share the immunity of the sovereign from suit otherwise than as the sovereign allows. But such a notion is a very dangerous departure from one of the first principles of our system of law. The sovereign, properly so called, is superior to suit for reasons that often have been explained. But the general rule is that any person within the jurisdiction always is amenable to the law. If he is sued for conduct harmful to the plaintiff his only shield is a constitutional rule of law that exonerates him. Supposing the powers of the Fleet Corporation to have been given to a single man, we doubt if any one would contend that the acts of Congress and the delegations of authority from the President left him any less liable than other grantees of the power of eminent domain to be called upon to defend himself in court. An instrumentality of government he might be, and for the greatest ends; but the agent, because he is agent, does not cease to be answerable for his acts (citing authorities). The opposite notion left some traces in the law (1 Rolle, Abr. 95, Action sur Case, T), but, for the most part, long had disappeared."

> "If what we have said is correct, it cannot matter that the agent is a corporation rather than a single man. The meaning of incorporation is that you have a person, and as a person one that presumably is subject to the general rules of law."

Among the incidental or implied powers which have been attributed to corporations from the earliest period is the power to sue and be sued. This power need never be expressly conferred. Whenever a corporation is duly created among the incidents "tacite annexed" the capacity to sue and be sued impleaded and be impleaded.

> Fletcher's Ency. on Corp. Vol 4, Sec. 2925, 2926.
>
> Thompson on Corp., 2nd Ed., Vol. 3, Sec. 3145, 14 a C. J.
>
> 785 and U. S. cases cited; 7 R. C. L. p. 689, Sec. 690.

In the case of American Cotton Oil Co. vs. Fleet Corporation, 270 Fed. 296, 297, Foster, District Judge of the Eastern District of Louisiana says:

> "The Emergency Fleet Corporation was created under the provisions of the Code of the District of Columbia by virtue of the authority vested in the United States Shipping Board by acts of Congress and has the capacity to sue

and be sued the same as other corporations. In the case of United States vs. Strang et al., 254 U. S. ——, 41 Sup. Ct. 165, 64 L. Ed. ——, decided January 3, 1921, the Supreme Court held that the Emergency Fleet Corporation must be regarded as a separate entity notwithstanding all of its stock is owned by the United States, citing United States vs. Planters' Bank of Georgia, 9 Wheat 904, 6 L. Ed. 244, and other authorities. The following cases are to the same effect: Gould Coupler Co. vs. Emergency Fleet Corporation (D. C.) 261 Fed. 716; Southern Bridge Co. U. S. Shipping Board (D. C.) 266 Fed. 747; Lord & Burnham Co. vs. U. S. Shipping Board (D. C.) 265 Fed. 955; Ingram Day Lumber Co. vs. U. S. Shipping Board Emergency Fleet Corporation (D. C.) 267 Fed. 283. In the case of The Lake Monroe, 250 U. S. 246, 39 Sup. Ct. 460, 63 L. Ed. 962, the Supreme Court held that a vessel of the Shipping Board might be seized under admiralty process in a case sounding in tort.

"There is no good reason why the corporation should not be sued for damages arising from tort as well as from breach of contract. The question may arise as to whether or not the property of the corporation may be seized and sold to satisfy a judgment, but there is no need to consider that in connection with the exception in this case. After the plaintiff

has established his claim, if he does so, there will be time enough to consider the method of collection.

"As the amount in dispute is more than $3000, and the case must be held to arise under the laws of the United States (Texas & Pac. Railroad vs. Cody, 166 U. S. 606, 17 Sup. Ct. 703, 41 L. Ed. 1132), the exception will be overruled. Ten days will be allowed in which to answer."

In the case of Eichberg vs. Fleet Corporation, 273 F. 886, an Action for damages was brought against the Fleet Corporation for breach of contract. The Fleet Corporation pleaded that it was a government agency, and that its acts were the acts of the United States. It claimed that the suit was in effect a suit against the United States and that the acts of Congress and the order of the President, and the Shipping Board was the agent of the United States and that the plaintiff contracted with it knowing that the United States was the principal and alone liable upon the contract.

The court held (p. 892) that the Emergency Fleet Corporation is not such an agency of the government as to render it immune from suit, citing **U. S. vs. Strang, 254 U. S. 491.**

In reference to the executive order, the court held as follows:

"An executive order delegating power conferred upon the President by the Act of Congress of June 15, 1917, Chapter 29, 40 Stat. 182, to the Shipping Board and the Emergency Fleet Corporation is set out for the purposes alleged of showing that the Fleet Corporation was the agent of the United States, and that plaintiff contracted for the sale of the timber and materials in this cause mentioned, knowing that the United States was the principal of the defendant, and, as such, alone liable upon the contract. It may be suggested, however, that the Fleet Corporation was authorized under its charter to enter into such a contract as the one in question and the presumption is that in the absence of evidence to the contrary, it was acting under its charter powers and not under any special power given it by the President, and, therefore, it would be liable for a breach of its contract to the same extent as any other corporation."

The language of the court in the above is very pertinent to the case at bar. We submit that the United States Spruce Production Corporation under its certificate of incorporation and under the corporation laws of the State of Washington and under the provisions of the Act of Congress of July 9, 1918, authorizing its incorporation, had full authority to make a contract or agreement agreeing to compensate the plaintiffs in error for such

damages as they might suffer by reason of said corporation and its officers and agents directing and controlling the operations of the logging camp and equipment of the plaintiffs in error.

It is respectfully submitted that this action may be maintained in the District Court of the United States for the District of Oregon, and that the judgment of the District Court should be set aside.

R. H. CAKE,
O. A. NEAL,
JOHN C. MURPHY,
F. R. SALWAY,

Attorneys for Plaintiffs in Error.

In the Supreme Court of the United States

OCTOBER TERM, 1924

PERRY S. OLSON AND BEN S. OLSON, Partners, Doing Business under the firm name and style of Olson Bros. or Olson & Olson, plaintiffs in error

v.

UNITED STATES SPRUCE PRODUCTION CORPORATION

No. 128

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON

BRIEF ON BEHALF OF THE DEFENDANT IN ERROR

STATEMENT

This writ of error brings up for review a judgment of the District Court of the United States for the District of Oregon dismissing a petition brought by the plaintiffs in error (a copartnership), upon the ground that the court had no jurisdiction to entertain the action. The District Judge made a certificate, pursuant to section 238 of the Judicial Code, that the jurisdiction of the court of the subject matter of the action was in issue, and was de-

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cided adversely to the plaintiffs-appellants and that by reason thereof the judgment of dismissal was entered. The certificate recites that " a judgment be made and entered herein dismissing said action for want of jurisdiction for the reason that the court held plaintiffs' only remedy was in the Court of Claims of the United States * * * and this ruling of the court is hereby certified to the Supreme Court of the United States * * *." (Rec. 31.)

This action was originally commenced by the plaintiffs-in-error (hereinafter called the plaintiffs), against the defendant corporation (hereinafter called the defendant), in the Circuit Court of the State of Oregon for the County of Multnomah, to recover the sum of $60,000.00, damages for profits lost, work performed, and materials furnished the United States in connection with logging operations carried on by plaintiffs under the direction of officers of the Government in sections 11, and 2, near Seaside. Clatsup County, Oreg. The cause was removed to the Federal District Court above named on April 10, 1922. (Rec. 14.)

On June 9, 1922, the defendant filed a demurrer to the complaint upon the ground that it did not state facts sufficient to constitute a cause of action in that the complaint did not show any cause of action ever arose against the defendant, or that the latter is liable in any pretended cause of action, or that any cause of action now exists in favor of

the plaintiffs. (Rec. 15.) This demurrer was sustaind by the District Court on January 2, 1923, and the plaintiffs were allowed 10 days from that date within which to file an amended complaint. On January 12, 1923, a motion for rehearing on the demurrer was made by the plaintiffs, which was denied on March 26, 1923. (Rec. 18–21.) On April 3, 1923, the plaintiffs filed a motion for leave to file an amended complaint (Rec. 21), which was denied on April 16, 1923 (Rec. 7). On April 30, 1923, the Court entered its order dismissing the original petition. (Rec. 28, 29.)

The specific question is whether the original complaint (set forth in the record at pages 2–14) states a cause of action of which the District Court had jurisdiction.

THE COMPLAINT

The complaint is very long (pp. 2–10) and only a brief summary is necessary.

It is alleged that the plaintiffs were partners; that the defendant was a corporation organized under the laws of the State of Washington by the Director of Aircraft Production under the Act of Congress of July 9, 1918 (Par. II p. 3); that in accordance with said Act of Congress all its capital stock, except qualifying shares, is owned by the Government of the United States, " and the Defendant, and the Trustees representing it, were elected by and for the said Government, and neither the Corporation nor the stockholders other than

the said Government have any interest in the said Corporation, or its property, except as agents of the said Government, and under and pursuant to the authority contained in the Acts of Congress " (Par. III, p. 3). The complaint then quotes at length from the National Defense Act. (Par. IV, p. 3.) It then refers to other acts authorizing the Secretary of War to acquire war material, including timber, saw mills, logging roads, etc. (Par. V, p. 4.) Paragraph VI, page 4, is as follows:

> That acting under, and pursuant to said Acts of Congress and the authority conferred upon the War Department of the United States Government, a Department known as the Spruce Production Division, with offices and headquarters at Portland, Oregon, and which Department under and pursuant to the provisions of said Acts of Congress and the authority given to the War Department was incorporated, and thereafter known as the United States Spruce Production Corporation, and that during all the times herein mentioned, Colonel Brice P. Disque, later Brigadier General Brice P. Disque, was in charge and command of said Spruce Production Division and later of said Spruce Production Corporation.

Paragraphs VII, VIII, IX, X, XI, XII, XIII, and XIV set forth various things done by Olson Bros. between March 1, 1918 and August 19, 1918, in connection with logging operation by direction of General Disque and other Army officers, acting

under the authority of the War Department and/or said Acts of Congress and/or direction of the Director of Aircraft Production, and promises by these officers that they "would be reimbursed by the Government." (P. 6.)

Paragraph XV, page 8, alleges that the Spruce Corporation was organized on the 19th day of August, 1918, and thereafter took over and assumed control of and undertook the work theretofore carried on by the Spruce Production Division, but there is no allegation of any particular work which was done from that time on until November 15, 1918, when the plaintiffs were notified to cease work, at which time General Disque "notified plaintiffs to send in their claim for damages."

Paragraph XVI, page 9, sets forth the Dent Act, and Paragraph XVII, page 9, alleges the filing of a claim pursuant to the act and its rejection.

Paragraph XVIII (Rec. 10) is as follows:

> That the Secretary of War has heretofore ruled that it is and has been the uniform policy of the settlement agents of the War Departments to refer any case involving operations of the United States Spruce Production Corporation to the claim board of that corporation, and that the decision of said board is final and will not be reviewed by the War Department, and that the only recourse of the claimants being to the proper State or Federal courts. Therefore the plaintiffs bring this action in this court.

The complaint is nothing more or less than one appropriate to an action under the Dent Act, tending to show that what was done by the plaintiffs was done pursuant to direction of officers acting for the War Department or for the President and pursuant to statutory authority. Indeed, the allegation in effect is that the action is brought because the claim under the Dent Act had been rejected. It is alleged as the basis of the action.

ARGUMENT

The court below had no jurisdiction of the cause of action alleged

An examination of the long and involved allegations of the complaint shows that there was no attempt to allege a cause of action against the United States Spruce Production Corporation based upon any contract made by it for its own benefit or anything done by it in its corporate capacity. The cause of action set forth is under the so-called Dent Act (Act of March 2, 1919, c. 94, 40 Stat. 1272), and alleges various things done by the plaintiffs in error by direction of officers of the United States Army and the War Department, pursuant to authority of various acts of Congress, particularly the Act of June 3, 1916, c. 134, 39 Stat. 166 (The National Defense Act); the Act of March 4, 1917, c. 180, 39 Stat. 1168, 1193 (The Naval Appropriation Act), the Act of April 11, 1918, as amended by the Act of July 9, 1918, c. 143, 40 Stat. 845 (The Army Appropriation Act).

It then sets forth the Dent Act; alleges the filing of a claim under that act; the rejection of the claim, and the ruling of the Secretary of War that the only recourse of the claimants is "to the proper State or Federal court. Therefore the plaintiffs bring this action in this court."

It is therefore, in express terms, an action brought because the Secretary of War had rejected a claim under the Dent Act. That is its sole basis. But under such act the Court of Claims has exclusive jurisdiction.

The first section of the Act, (40 Stat. 1272), provides as follows:

> That the Secretary of War be, and he is hereby, authorized to adjust, pay, or discharge any agreement, express or implied, upon a fair and equitable basis that has been entered into in good faith during the present emergency and prior to November twelfth, nineteen hundred and eighteen, by any officer or agent acting under his authority, direction, or instruction, or that of the President, with any person, firm, or corporation for the acquisition of lands, or the use thereof, or for damages resulting from notice by the Government of its intention to acquire or use said lands, or for the production, manufacture, sale, acquisition or control of equipment, materials or supplies, or for services, or for facilities, or other purposes connected with the prosecution of the war, when such agreement has been performed in whole or in part, or expenditures

> have been made or obligations incurred upon the faith of the same by any such person, firm, or corporation prior to November twelfth, nineteen hundred and eighteen, and such agreement has not been executed in the manner prescribed by law: *Provided,* That in no case shall any award, either by the Secretary of War or the Court of Claims, include prospective or possible profits on any part of the contract beyond the goods and supplies delivered to and accepted by the United States and a reasonable remuneration for expenditures and obligations or liabilities necessarily incurred in performing or preparing to perform said contract or order.

Section 2 gives jurisdiction to the Court of Claims to award fair and just compensation should the action of the Secretary of War be unsatisfactory to the claimant. The jurisdiction thus conferred is exclusive. (*Nassau Smelting & Refining Works* v. *United States,* 266 U. S. 101.)

Congress understood that this act would apply to the operations of the United States Spruce Production Corporation.[1]

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[1] On February 27, 1919, the Senate having under consideration the bill which became the Dent Act the following colloquy took place with reference to contracts made by the Spruce Corporation:

Mr. CHAMBERLAIN. The matter has been back and forth between the two Houses for a week or more; and in order to reach any agreement at all we practically took the House bill as a basis for reaching an agreement. If that language has been left out, it has been left out because it was not in the House bill. I will say to the Senator, however, that we did insert language in conference in order to meet the situation which the Senator suggests, not only where these contracts were made by any officer or agent acting under the Secretary of War, but where they were made by anyone acting

This act, it will be observed, applies to agreements, express or implied, entered into by any *officer or agent* acting under authority, direction, or instruction of the Secretary of War or of the President.

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under authority or direction of the President. I thought that was broad enough to cover it. It may not be. I am perfectly frank to say so.

* * * * * * *

Mr. KNOX. The point that is made by the Senator from Washington, it seems to me, is rather a technical one. I recall very distinctly that the sole and only purpose for which this corporation was formed was to act as an agent or an agency for the Government, and I have not the slightest doubt myself that the language which has just been read by the Senator from Oregon covers the situation completely.

Mr. JONES of Washington. I am very glad, indeed, to have the opinion of the Senator from Pennsylvania with reference to the matter. I am inclined to think that it covers it, too, but I should like to be sure of it if it is at all possible, because, as the Senator knows, this Spruce Production Corporation was organized for the sole purpose of aiding the War Department and the Government in securing timber and material for airplane work, and the contracts that these people made with the Spruce Production Corporation were, in fact, made for the Government, for the War Department.

* * * * * * *

Mr. JONES of Washington. They made their contracts with the Spruce Production Corporation. The Spruce Production Corporation, I have no doubt, was acting under the Signal Corps. I think its officers were largely officers of the Signal Corps, and so it seems to me that it is covered by this language, but I wanted to have the Record show the opinion of the Senators in charge of the matter. (Cong. Record, Vol. 57, Parts 1–5, pp. 4413, 4414, 65th Congress, 3d Session.)

From the Report of the Director of Air Service to the Secretary of War, dated Aug. 25, 1920 (Annual Reports, War Department fiscal year ended June 30, 1920), the following appears at page 22:

Settlement of claims.—Fifty-one Dent Act claims presented to the corporation have been referred to the contract board during the fiscal year. One of these was withdrawn by the claimant. The remaining 50 claims totaled $6,955,595.85. Forty-nine claims have been considered by the board; of these, 28 have been disallowed in their entirety and 21 have been settled, requiring the expenditure of funds amounting to $338,796.86.

The allegations of the complaint (Par. VI, pp. 4 and 5) are that, acting pursuant to the Acts of Congress and the authority conferred upon the War Department, a department known as the Spruce Production Division was, under and pursuant to the provisions of the said Acts of Congress and the authority given to the War Department, " incorporated and thereafter known as the United States Spruce Production Corporation," and during all the times mentioned Colonel (afterwards Brigadier General) Disque " was in charge and command of said Spruce Production Division and later of said Spruce Production Corporation." The acts alleged in the complaint were under this authority—that is, authority of an agent of the War Department acting pursuant to the direction of the Secretary of War or the President—exactly the case covered by the Dent Act. The corporation was, in effect, alleged to be merely another name for the Spruce Production Division—a department of the War Department.

The only things specifically alleged to have been done by plaintiffs were prior to the nineteenth day of August, 1918, when the corporation was organized; and it is alleged that thereafter the corporation took over and assumed control of and undertook the work theretofore carried on or directed by the Spruce Production Division, and it, acting through and by the same officers " further promised and assured plaintiffs that they would be compensated

therefor " and " thereby ratified and confirmed all that had been therefore done and/or promised by said Spruce Production Division." (Par. XV, p. 8.) The only allegations with respect to prior promises of compensation were that the plaintiffs " would be reimbursed by the Government." (Par. VIII, p. 6.)

The case presented, therefore, is not one calling for determination of the question whether the Spruce Corporation is generally immune from suit, and such was not the basis of the decision by the court below. The court said (page 17):

> If it be conceded that the United States Spruce Production Corporation is a governmental agency, not possessing the attributes of sovereignty, and subject to be sued in the courts, as the Fleet Corporation is, yet I am persuaded that the Dent Act has provided, and was intended to provide, a complete remedy for claimants of plaintiff's class, by which their claims may be adjusted, and also a tribunal in which to sue for the appropriate relief.

The status of the Spruce Production Corporation was considered by this court at the last term in the case of *Clallam County* v. *United States and United States Spruce Production Corporation*, 263 U. S. 341. The question was whether the property held by the Spruce Corporation was subject to State taxation. This court held that it was not. After tracing the history

and purposes of the corporation and its activities, Mr. Justice Holmes, speaking for the court, summarized the matter in this language (p. 344):

> In short the Spruce Production Corporation was organized by the United States as an instrumentality for carrying on the war, all its property was conveyed to it by or bought with money coming from the United States and was used by it solely as means to that end, and when the war was over it stopped its work except so far as it found it necessary to go on in order to wind up its affairs. When the winding up is accomplished there will be a loss, but whatever assets may be realized will go to the United States.

After considering the claim of the State that taxation of the property of the agent is not taxation of the means, the court continued (p. 345):

> This is not like the case of a corporation having its own purposes as well as those of the United States and interested in profit on its own account. The incorporation and formal erection of a new personality was only for the convenience of the United States to carry out its ends. It is unnecessary to consider whether the fact that the United States owned all the stock and furnished all the property to the corporation taken by itself would be enough to bring the case within the policy of the rule that exempts property of the United States.

> *Van Brocklin* v. *Tennessee,* 117 U. S. 151. It may be that if the United States saw fit to avail itself of machinery furnished by the State it would not escape the tax on that ground alone. But when we add the facts that we have recited we think it too plain for further argument that the tax could not be imposed. See *United States Spruce Production Corporation* v. *Lincoln County,* 285 Fed. 388; *United States* v. *Coghlan,* 261 Fed. 425; *King County* v. *United States Shipping Board Emergency Fleet Corporation,* 282 Fed. 950.

See, also, *Erickson* v. *United States,* 264 U. S. 246.

The suit is not against the corporation upon contracts made by it, in its own behalf or upon work done for it at its request. The suit is for compensation which agents of the War Department had promised would be paid by the Government of the United States for work done pursuant to authority conferred by Acts of Congress upon the President and Secretary of War. An agent is not ordinarily suable upon contracts made in behalf of a disclosed principal, where there are no allegations that the agent acted fraudulently or beyond the scope of his authority; and while ordinarily the question of liability of an agent under such circumstances would go to the merits, rather than to the jurisdiction of the court, nevertheless where the allegation is that the agent was an agent of the United States—a division of its War Department—that what it did

was done in behalf of the United States, and pursuant to authority of Acts of Congress; that its promises were of compensation to be made by the United States; and where it appears that Congress has provided a special and exclusive remedy under such circumstances, the conclusion would seem to follow that no court other than the court specified in the Act of Congress has jurisdiction of the subject matter of the controversy.

Furthermore, the Dent Act waives the provision of law in favor of the United States relating to the manner prescribed for executing the agreements, and limits the liability of the United States by excluding prospective or possible profits. The United States has therefore consented to be sued in a class of cases which could not theretofore have been brought against it. It has provided for itself a special and partial defense to such claims, and has prescribed a specific court in which such matters may be litigated. No other court, therefore, has jurisdiction to entertain a suit against a Government agent based upon such a claim and subject to such a limit of liability. Looked at in this way, the question seems clearly to be one of jurisdiction. Though the defendant named is the corporation, nevertheless the allegations themselves are to the effect that it is not the real party in interest. The suit is a mere device to avoid the jurisdiction prescribed by Congress, and to seek a judgment, binding upon the property of the United States, in a

tribunal deemed more favorable and under circumstances less onerous. It appearing, therefore, that the suit " does not really and substantially involve a dispute or controversy properly within the jurisdiction of said court," it was properly dismissed. (Judicial Code, section 37.)

The judgment should be affirmed.

JAMES M. BECK,
Solicitor General.
ALFRED A. WHEAT,
Special Assistant to the Attorney General.
FEBRUARY, 1925.

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OLSON ET AL., CO-PARTNERS, DOING BUSINESS UNDER THE FIRM NAME OF OLSON BROS. OR OLSON & OLSON *v.* UNITED STATES SPRUCE PRODUCTION CORPORATION.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON.

No. 128. Argued March 5, 6, 1925.—Decided March 16, 1925.

1. Where a federal statute excludes jurisdiction in state as well as federal courts, a judgment of a District Court dismissing the case for that reason is not reviewable here directly under Jud. Code § 238. P. 467.
2. The Dent Act, which provides for adjustment of certain classes of claims against the United States through the Secretary of War and by suit in the Court of Claims, did not purport to confer jurisdiction on that court over a suit against the United States Spruce Production Corporation, which, though a federal agency, is a corporation of the State of Washington. P. 466.
3. An action against the Spruce Corporation to recover for work done, materials furnished or destroyed and profits lost in consequence of a government requisition prior to the Dent Act, *held* within the jurisdiction of the state court and of the District Court on removal, whatever the merits. *Id.*

Reversed.

ERROR to a judgment of the District Court dismissing an action for want of jurisdiction as a federal court.

Mr. O. A. Neal, with whom *Messrs. R. H. Cake, John C. Murphy* and *F. R. Salway* were on the brief, for plaintiffs in error.

The United States Spruce Production Corporation is a distinct corporate entity and may be sued as any private corporation. *Sloan Shipyards Corp.* v. *Fleet Corp*, 258 U. S. 549; *The Lake Monroe* 250 U. S. 246; *Com. Finance Corp.* v. *Landis*, 261 Fed. 440; *Gould Coupler Co.* v.

Fleet Corp., 261 Fed. 716; *Lord & Burnham Co.* v. *Fleet Corp.*, 265 Fed. 955; *Bank-Russo-Asiatique of London* v. *Fleet Corp.*, 266 Fed. 897; *Ingram Day Lumber Co.* v. *Fleet Corp.*, 267 Fed. 283; *United States* v. *Salas*, 234 Fed. 842; *Panama R. R.* v. *Curran*, 257 Fed. 768; *Ingersol Rand Co.* v. *Fleet Corp.*, 187 N. Y. S. 695; *Eichberg* v. *Fleet Corp.*, 273 Fed. 886; *In re Eastern Shore Shipbuilding Corp.*, 274 Fed. 893; *American Cotton Oil Co.* v. *Fleet Corp.*, 270 Fed. 296; *United States* v. *Strang*, 254 U. S. 491; *Krichman* v. *United States*, 254 U. S. 616.

The United States Spruce Production Corporation was organized under the laws of the State of Washington, which creates it a body politic and corporate with power to sue and be sued in any court of law or equity where it may transact business. This is a statement of a power which is incidental to every corporation.

The doctrine of government immunity has but little place in this country. *United States* v. *Lee*, 106 U. S. 196; *Gould Coupler Co.* v. *Fleet Corp.*, 261 Fed. 716; *Fed. Sugar Ref. Co.* v. *U. S. Sugar Equalization Bd.* 268 Fed. 585.

Exclusive ownership of stock by the United States does not make the corporation immune from suit. *United States* v. *Strang*, 254 U. S. 491; *Salas* v. *United States*, 234 Fed. 842; *Panama R. R.* v. *Curran*, 256 Fed. 772; *Bank of U. S.* v. *Planters' Bank*, 9 Wheat. 904; *Bank of Ky.* v. *Wister*, 2 Pet. 318; *Brisco* v. *Bank of Ky.*, 11 Pet. 257.

The creation by Congress of a corporation to facilitate discharge of a governmental function does not in itself imply immunity from suit. *Osborn* v. *Bank*, 9 Wheat. 738; *McCulloch* v. *Maryland*, 4 Wheat. 315; *Farmers' Bank* v. *Dearing*, 91 U. S. 29; *Thompson* v. *Union Pac. R. Co.*, 9 Wall 579; *Davis* v. *Elmira Savings Bank*, 161 U. S. 275; *United States* v. *Union Pac. R. Co.*, 98 U. S. 569; *Luxton* v. *North River Bridge Co.*, 156 U. S. 525.

Mr. Alfred A. Wheat, Special Assistant to the Attorney General, with whom *Mr. Solicitor General Beck* was on the brief, for defendant in error.

The court below had no jurisdiction of the cause of action alleged. There was no attempt to allege a cause of action against the Corporation based upon any contract made by it for its own benefit or anything done by it in its corporate capacity. The cause of action set forth is under the so-called Dent Act. It is, in express terms, an action brought because the Secretary of War had rejected a claim under the Dent Act. That is its sole basis. But under that act the Court of Claims has exclusive jurisdiction, *Nassau Smelting & Refining Works* v. *United States*, 266 U. S. 101.

The only things specifically alleged to have been done by plaintiffs were prior to the 19th day of August, 1918, when the corporation was organized; and it is alleged that thereafter the corporation took over and assumed control of and undertook the work theretofore carried on or directed by the Spruce Production Division, and, acting through and by the same officers, "further promised and assured plaintiffs that they would be compensated therefor" and "thereby ratified and confirmed all that had been theretofore done and/or promised by said Spruce Production Division." The only allegations with respect to prior promises of compensation were that the plaintiffs "would be reimbursed by the Government." The case presented, therefore, is not one calling for determination of the question whether the Spruce Corporation is generally immune from suit, and such was not the basis of the decision by the court below.

As to the status of the Spruce Production Corporation, see *Clallam County* v. *United States*, 263 U. S. 341; *Erickson* v. *United States*, 264 U. S. 246. The suit is not against the corporation upon contracts made by it, in its own behalf, or upon work done for it at its request. The

suit is for compensation which agents of the War Department had promised would be paid by the Government of the United States for work done pursuant to authority conferred by acts of Congress upon the President and Secretary of War. While ordinarily the question of liability of an agent would go to the merits, rather than to the jurisdiction of the court, nevertheless, where the allegation is that the agent was an agent of the United States—a division of its War Department—that what it did was done in behalf of the United States, and pursuant to authority of acts of Congress; that its promises were of compensation to be made by the United States; and where it appears that Congress has provided a special and exclusive remedy under such circumstances, the conclusion would seem to follow that no court other than the court specified in the act of Congress has jurisdiction of the subject matter of the controversy.

Furthermore, the Dent Act waives the provision of law in favor of the United States relating to the manner prescribed for executing the agreements, and limits the liability of the United States by excluding prospective or possible profits. The United States has therefore consented to be sued in a class of cases which could not theretofore have been brought against it. It has provided for itself a special and partial defense to such claims, and has prescribed a specific court in which such matters may be litigated. No other court, therefore, has jurisdiction to entertain a suit against a Government agent based upon such a claim and subject to such a limit of liability. Looked at in this way, the question seems clearly to be one of jurisdiction.

Though the defendant named is the corporation, nevertheless the allegations themselves are to the effect that it is not the real party in interest.

The suit is a mere device to avoid the jurisdiction prescribed by Congress, and to seek a judgment, binding

upon the property of the United States, in a tribunal deemed more favorable and under circumstances less onerous. It appearing, therefore, that the suit "does not really and substantially involve a dispute or controversy properly within the jurisdiction of said court," it was properly dismissed. Judicial Code, § 37.

MR. JUSTICE HOLMES delivered the opinion of the Court.

This case comes here directly from the District Court by a writ of error and a certificate that the action was dismissed upon the ground that the Court had no jurisdiction.

The suit was begun in a Court of the State of Oregon and removed. It was brought against the corporation described in *Clallam County* v. *United States*, 263 U. S. 341, to recover for work done, materials furnished or destroyed, and profits lost, during the year 1918, in consequence of a requisition by the Government that the plaintiffs should devote their logging camp to the production of airplane timber alone. The declaration is long and suggests throughout an effort to state a case under the Dent Act, March 2, 1919, c. 94; 40 Stat. 1272; and to account for this suit by the fact that the plaintiffs' claim under that Act was disallowed. The assurances and promises relied upon seem to have been the assurances and promises of successive agents of the United States that the United States would pay for what the plaintiffs were asked to do.

The Court below seems to have regarded the Dent Act as giving the only remedy in cases like this, although the supposed cause of action arose before that Act was passed; and according to the certificate treated the statute as excluding jurisdiction elsewhere. If the suit were against the United States, as no Court has jurisdiction over the

United States except when it is granted, the ruling might have been correct. But this suit is against a corporation of the State of Washington, brought originally in a Court of Oregon to enforce a supposed liability in contract. Even if a statute of the United States created a bar, it would be unusual if the act went to the jurisdiction rather than to the merits, *Fauntleroy* v. *Lum,* 210 U. S. 230, 235; and if the statute went further it would be more likely to exclude jurisdiction in all other Courts rather than merely in Courts of the United States as such. If the statute excluded jurisdiction in State as well as United States Courts the case could not be certified under § 238 of the Judicial Code. *Fore River Shipbuilding Co.* v. *Hagg,* 219 U. S. 175, 178. But the Dent Act does not contemplate suits against corporations in the Court of Claims, and we perceive no ground for the ruling as certified. It well may be that the Court was right in deciding that the allegations were not sufficient to justify a suit against the corporation, and our judgment is without prejudice to a judgment dismissing the case upon the merits. But it was error to decide that there was a want of jurisdiction and therefore the judgment must be reversed.

Judgment reversed.